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Criminal Law.

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Criminal Law

1. That branch of municipal law which treats of public wrongs is called criminal law, — pleas of the crown, or crown law. 4 Bl. 2.

The term public wrongs includes all crimes & misdemesnors — i.e all offences agt municipal law: For all wrongs are not offences. 4 Bl. 1. Public wrongs are offences agt. the State in its aggregate capacity. Private wrongs are offences agt. private persons. ib. 1

A crime, or misdemesnor, is an act committed, or omitted, in violation of a public law, forbidding, or commanding it. 4 Bl. 5.

The words, crimes, and misdemesnors, are strictly synonymous; — tho' in common acceptance, the former denotes offences of the more atrocious kind, — the latter those of the less heinous character. 4 Bl. 5.

A crime or misdem.r of any kind is an infraction or violation, of a public right, inherent in the whole State, or community, in its aggregate capacity. A civil injury is an infraction of a private right.

In almost every case, a public wrong actually includes a civil injury. ex. assault & battery is a violation of public peace, & private security — So of libel, murder, theft,

robbery, arson. Some offences, however, created by positive law, do not include a civil injury, as smuggling: But offences punishable by the com. L. almost always do.

There are other cases, in which a pub. wrong may, or may not, include, or produce, a civil injury: as a pub. nuisance.

And in these cases the object of the law is, to give, as far as possible, a trofold redress. — i.e. to the public, & to the individual — punishment for the pub. wrong, damag. for the civil injury. 4 Bl. 5-7.

Yet if the offence amounts to felony, the private injury is, regularly, at C. L. merged in the crime, & no private redress can be had. ex. Treason murder, Larceny. 4 Bl. 5.6. Bull. 181. 2 Roll. 55 7. l.s.10. 1 Mod. 283. 5 Com. 582.

The doctrine of merger has been said to be founded on the policy of the law; the object of which is to prevent the compounding of felonies on private satisfaction, (and thus criminals escaping punishment. But the only true and rational foundation seems to be, that in cases of felony, the punishment, for the public wrong, renders private redress, for the civil injury, impossible; the punishment, being, in general, a forfeiture of life (and property. 4 Bl. 6. Str. 873. L. R. 1572. 3 T. R. 176-7. arg. — This rule, not practically harsh — crown generally does justice to individual.

If a crime, not amounting to felony, injures an individual, he has his private remedy. The doctrine of merger does not apply: The crime does not work a forfeiture of life or property. Ex. Libel, battery, pub. nuisance. 4 Bl. 6.

In Con^t., this doctrine of merger seems not to have been regarded. Civil suits have been here sustained for perjury, arson, &c. Forfeiture of prop^y. for crimes, here, takes place only in two cases — destroying magazines &c. of U.S. in time of peace — & manslaughter. Stats. Con^t. And in neither case is life forfeited.

The right of punishing for crimes is founded on the law of nature; & in some instances, authorized by the revealed law of God; as in case of murder. — This right, in a state of nature, was vested in every individual, injured by a crime; for it must have existed somewhere, as otherwise there would be no execution of the law of nature — no sanction; and it cannot exist, elsewhere than in the individ^l. injured. 4 Bl. 7.

In a state of civil society, this right resides in the sovereign power; & men are no longer their own judges & avengers.

Society's right to punish is said, by some, to be derived from the consent of its members, express, or tacit; &

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therefore, to be founded on compact. 4 Bl. 8. This foundation is broad enough to authorise most punishments, but not all. Ex. not sufficient for capital punishments for mala prohibita; nor any punishment for such offences — for such could not exist in a state of nature. But, in regard to the right of society to punish offences mala in se, a consistent theory may be made out from compact: For, in these cases, the individuals, who had the right to punish, in a state of nature, might transfer it. This notion of compact, is, however, very artificial, and wholly unnecessary. 4 Bl. 8-9. Tattell (quarto) 74. Paley's moral Philosophy, 341, &c. 2 Burlemaque 142.
Consent of the Criminal can, in no case, be sufficient to authorise capital punishment. Ibid.

But the most rational & broad ground of the right of punishing, not only in case of mala prohibita, but of all offences, is (1) expediency, or (2) necessity; for what is expedient, is agreeable to the law of reason — agreeable to justice. Men are formed for civil society: But civil society cannot exist, without a right of punishing for offences agt the society. A sovereign state, tho' regarded as a moral person, has different attributes, from those of a natural person — different rights, — different duties — different nature, & essence. Tattell, Prel. 7. 8. 1 Hale 13. 4 Bl. 9. 10. Paley. 341. &c.

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The end of all human Punishmt. is the Prevention of crimes: Punishment is neither an atonement, nor a satisfaction, for the injury. – The Prevention of crimes is to be attained in one, or more, of 3 ways. 1. By reforming the offender. 2. By depriving him of the power of committing future crimes. 3. By deterring others from offending. The first object is attained by disciplinary punishment – as penetentiary &c: The second, by death, or perpetual imprisonment: The third, by infamous punishments. 4 Bl. 11. Paley. 234.

Of the Persons capable of committing crimes.

Regularly, all persons are liable to Punishmt. for disobedience to the laws, except such as are expressly exempted 4 Bl. 20.

All the excuses, which exempt the perpetrator of a forbidden act, from Punishmt., are reducible to this single consideration – viz. the want, or defect, of will – i.e. moral agency. To constitute a crime, there must be a will & a forbidden act, or neglect, concurring: for, nemo fit reus, nisi mens sit rea. – Scens as to forcible civil injuries. 4 Bl. 20-1. 1 Hawk. 2.

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Defect of will exists in three cases: 1. Where there is a defect of understanding. Ex. Infants, under the age of discretion. They are deemed, in law, not capable of distinguishing between right & wrong. — They are, therefore, not punishable, by any criminal prosecution, in any case. 1 Hawk. 1.2.
2. 4 Bl. 22.

If the offence is an omission, infants are not, generally, punishable, at C.L., tho' of the age of discretion. Ex. not repairing roads, bridges, &c. 1 Hale 20.22. 4 Bl. 22. Laches not imputable to infants. The offence is ascribed, rather to a want of forethought & providence, than to a positive criminal disposition.

The age of legal discretion, as the law now stands, is that of 14 years — under this age, the presumption is in favour of the infants innocence — But, as to all infants between 14 & 7, this presumption may, in capital cases, at least, be rebutted. If under 7, it cannot, in any case, be rebutted. (This distinction, subjecting infants under 14, if doli capaces, is laid down, by Blackstone, with respect to felonies only.) 1 Hawk. 2. 4 Bl. 23. 1 Hale. 27. Fost. 72. 1 Hale, 25-6.

May not an infant under 14 be punished for breach of Peace, riot, & common misdemeanors? It seems not, according to Blackstone. 4 Bl. 22-3. Sed Qu.

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Idiots, & Lunatics, are not punishable for their acts while under these incapacities. 4 Bl. 24. 3 Inst. 6. 1 Hale 10. 43. 65. 1 Hawk. 2. Secus, in case of a Lunatic, if he offends in a lucid interval. 4 Bl. 25. 1 Hale. 31.

A person deaf & dumb, from nativity, may be tried, and punished, for even a capital crime, if ideas can be conveyed to him, by signs. Leach. 105. 394. 2 Hale. 317. 2 Hawk. 462. 4 Bl. 324. 1 M & N. 158. – When this is the case, he is supposed doli capax — capable of a guilty intention, or motive. — Otherwise, not.

If one commits a capital offence, & before arraignment becomes insane, he cannot be arraigned; – if after arraignment, he cannot be tried; – if after verdict agt. him, no judgment; – if after judgment, execution must be stayed. 1 Hawk. 2. 3 Inst. 46. 1 Hale 10. 34. 370. 4 Bl. 24. 395.

If doubtful, in any of these cases, whether the prisoner is non compos, the fact must be tried by a jury. 4 Bl. 25.

He, who incites a madman to do an unlawful act, is himself the offender – the principal. 1 Hawk. 3. 1 Hale. 617. Hely. 53. 4 Bl. 35.

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Voluntary intoxication is no excuse; but rather an aggravation. 1 Co. 5. 242 a. 4 Bl. 25-6. 1 Hawk. 2. 3. (8vo) Flow. 19. a. 4 Co. 125. 1 Hale. 32.

But in case of habitual debility of mind, produced by a long course of intoxication, it is otherwise, I presume: It thus becomes a disease. So, if intoxication is not voluntary, but produced by force, or fraud, I presume.

2. There is a defect of will, when the understanding, tho' sufficient, is not exerted. Here the will is neutral; it does not concur with the act.

General rule that if one commits an unlawful act, by misfortune, or chance, he is excused. Here is a defect of will. 4 Bl. 26. 1 Hawk. 3. 1 Hale. 39. 4 Co. 124. Hely. 123.

But if one, intentionally doing an unlawful act, does unintentional mischief, he is not excused. 4 Bl. 27. 1 Hale. 39. He has the mens rea, - & must abide the consequences of his voluntary act.

Ignorance, or mistake, in point of fact, excuses. Here is a defect of will. Excus. of a mistake in law - here the will concurs with the act. Cro. C. 538. 4 Bl. 27. 3 T. R. 514. Flow. 343. T. Ray. 467-8. Burr. 25. 1 Hawk. 3. 110. 1 Hale. 42-3.

3. There is a defect of will, arising from compulsion, or necessity. Here the will opposes the deed, or, at least, does not approve it. Ex. If the Legislature enacts an iniquitous law, commanding an act contrary to religion or morality; — the Subject is excused in obeying: — For he acts under the obligation of civil subjection. 4 Bl. 21. 27-8.

A feme covert is, in many instances, excused from punishmt, when she does an unlawful act thro' the coercion of her husband; or, (which is the same thing), in his company. Ex. Theft, & burglary. (see "Hust. & W.") 10 Mod. 63. Hely. 31-7. 1 Hale 45-7. 4 Bl. 28. — Reason of the rule seems to be in the ancient law relative to benefit of clergy. 4 Bl. 29. n.

But if she commits these crimes voluntarily, or by the bare command of her husband, & in his absence, she is not excused. 4 Bl. 29. 1 Bac. 294. 9 Co. 71. 1 Hawk. 3.
Are not theft, & burglary, mala in se? 4 Bl. 28-9. 230-241-2.

In case of treason, murder, & it is said, robbery, even coercion by the husband does not excuse. 1 Hawk. 2. 1 Bac. 294. 4 Bl. 29. 1 Hale. 47. Hely. 31. — Reason, heinousness of the crime.

So, in manslaughter (4 Bl. 29. n. 1 Hale. 47. Qu. as to robbery, 1 Hawk. 4. n.) But, it seems, she is thus excused in all cases of felony, except murder & manslaughter. 4 Bl. 29. n.

Neither a child, nor a servant, is, as such, excused, for any crime, by the command of parent or master. 4 Bl. 28-9. 1 Hawk. 3. (5th ed.) 3 Hel. 34. Moore. 813. 1 Hale. 44.

Another species of compulsion, working a defect of will, is duress per minas. This excuses many unlawful acts. Ex. Treasonable acts excused by compulsion of enemy, or rebels. 4 Bl. 30. 1 Hale. 50. 1 Hawk. (5th ed.)

But the last excuse holds, chiefly, with regard to positive offences, only, — as treason; — not as to natural offences; — as killing an innocent man, to escape death.

Another kind of necessity arises from legal compulsion. The will, in this case, is passive. Ex. An officer of the law is bound to make an arrest, or disperse rioters &c & if resistance is made, killing may be justified. 4 Bl. 31. 1 Hale 53.

Stealing to relieve extreme want of food, or clothing, is not justified by C. L. 4 Bl. 31. 1 Hale 54. Means not justified by the end. — It would lead to dangerous evasions.

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Degrees of Guilt. Of Principals & Accessories.

One may be a Principal, in an offence, in two degrees. A principals in the first degree, is he, who is the actor, or absolute perpetrator: – In the second, he, who is present, & abetting the actual perpetration. 4 Bl. 34. Doug. 197. 1 Hale. 615. Flow. 97.

According to Hawking, the offenders, in the last case, are principals in the first degree. 2 Haw. 258. 326. 441. – Qu. 2 Mc. N. 523. 527-8. 1 Hale. 437. 4 Burr. 2075. The latter were anciently considered as accessories only. 2 Mc. N. 523. 1 Hale. 437.

The presence, necessary to make a principal in the 2nd degree, need not be an actual standing by, within sight, or hearing: Constructive presence is sufficient. Ex. Keeping watch, or guard, at a convenient distance. 4 Bl. 34. Post 350. Doug. 197. Mc. N 539.

To aid & abet a person unknown, will make a principal, in felony. Leach. 291. 2 Mc. N. 534.

The above rules hold as well of Stat., as of C. L., felonies. 2 Mc. N. 525.

Even a constructive presence is not always necessary to make a principal in the first degree. Ex. Preparing poison, & exposing it, – which is taken, in the offender's absence: – A trap: a pit fall –

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letting out a wild beast, with intent to do mischief:- Here the offender is Principal in the first degree. 4 Bl. 34-5. Hely. 52. Fost 349. 3 Inst. 138. 1 Hale. 617. 2 Harr. 315. 443. 4 Co. 44. 9 Co. 81. - He cannot be principal in the 2nd degree; for this would imply that another person is guilty in the first degree - which, in such cases, cannot be.

A special verdict, finding, only, that the prisoner was present, is not sufficient to warrant a judgment agt. him. 2 Mc. R. 527. 531. 535. Hely 77-9. 4 Burr. 2078.

An accessory is one, who is not the chief actor in the offence, nor present at the perpetration; - but is, in some way, concerned in it, before, or after, the fact. 4 Bl. 35.

In high treason, there can be no accessory. All concerned are principals, on account of the atrocity of the crime. Besides, the bare intent to commit treason, is, in some cases, actual treason. 4 Bl. 35. 3 Inst. 138. 1 Hale. 613. 2 Harr. 439-40. Co. L. 57. 12 Co. 81-2. - Under the Constitution of U.S., treason is levying war agt. U.S.

Whatever, then, will make one an accessory, in Felony, makes him a principal, in high treason. (Formerly questioned as to accessories after the fact) 4 Bl. 35. 1 Harr. 58. 2 Bl. 439-40. 3 Inst. 318. 12 Co. 81-2. Dy. 295.

There may be accessories in petit treason, murder, & other felonies, except those, which, in judgment of law, are unpremeditated;- as manslaughter:- in such, there can be none before the fact.

On the other hand, in petit larceny, & all crimes under the degree of felony, there can be no accessories. All concerned are guilty as principals. 4 Bl. 36. 191. 1 Hale. 613. 615-16. 1 Hawk. 115-132. 2 Ib. 441. Co. L. 57. Mo. 866. 1 Sid. 312. Cro. E. 750. 12 Co. 81. For in such minor offences, minute differences, in the degrees of guilt, do not require legal discrimination.

An accessory cannot be guilty of a higher crime than his principal. Ex. A servant causes a stranger to murder his master, or a wife, her husband: The servant, being absent, is accessory to the crime of murder only. But if he had been present, & assisting, he would have been guilty of petit treason, as principal - & the stranger, also as principal, of murder only. 4 Bl. 36. 8 Ins. 139. 1 Hawk. 132. 2 Ib. 445. Ay. 128. 332. Mo. 91. 1 Hale. 615.

Accessories are of two descriptions: First, before the fact; second, after the fact. - An accessory before the fact, is one, who procures, counsels, or commands, another to commit a felony; being himself absent, at the time of the act:- Absence is necessary - otherwise, he is principal. 1 Hale. 615-16. 4 Bl. 36. 2 Hawk. 445. Plow. 475.

He, who abets another to an unlawful act, is guilty of, (or, accessory to), all that ensues upon that act; - but not to any thing substantially distinct from it, & not directly ensuing upon it. Ex. A. commands B. to beat C. - B. beats him till he dies. A. is guilty of the murder, as accessory. So, A. commands B. to poison C. - B. shoots, or stabs, him; A. is accessory. Killing C. is the substance of the crime abetted - the manner is but circumstance. But if A. commands B. to burn C's house, & B. in doing it, robs the house, A. is not accessory to the robbery. The act done, is substantially different from that commanded. 4 Bl. 37. 2 McN. 537. 1 Hale. 617. 2 Ham. 445-7. Flow. 475. Foat. 370-1.

To solicit one to commit a felony, or, it seems, any other offence, is a misdemeanor, if the crime be not committed. 2 East. 5. 5 Mod. 101. 2 Show. 1. L.C.R. 1377. 3 East. 381. - Tendency dangerous - therefore punishable.

If the abettor retracts, before the act done, he is not accessory, it seems. 2 Ham. 445. (8vo) 3 Ins. 51. 1 Hale. 537. Foat. 354. Flow. 475-5.

Stat. felonies, as well as those at C.L., admit of accessories, tho' the stat. is silent, as to them. The former having the incidents of C.L. felonies. Leach. 64. 1 Ham. 154.

The bare concealing of an intended felony, is only a misprision of felony; which is punished only with fine & imprisonmt. 2 Harr. 447. No. 8. 3 Ing. 139. 142. 4 Bl. 121. – Misprision, what, 4 Bl. 119. 3 Inst. 35. 1 Hale. 127.

Persons, who are accidentally present, when a felony is committed, & do not endeavour to prevent it, & to apprehend the felon, are guilty of a misdemeanor – fined & imprisoned. Exception in favour of infants – to them no laches is imputed. 2 Harr. 115-6. 442. Noy. 50.

4 An accessory after the fact, is one, who receives, relieves, comforts, or assists, a felon, knowing him to be such. 4 Bl. 37. Hely. 45. 2 Harr. 188. 204-5. 448. &c. 1 Hall. 518-20. But the assistance given, must be with intention to hinder public justice: As to prevent the felon from being apprehended, tried, or punished. 4 Bl. 38. Ex. Harbouring & concealing – furnishing with a horse &c. to escape – rescuing – assisting in an escape from gaol, by instruments – bribing the gaoler, &c. Hely. 45. 77.

To relieve a felon, in gaol, with necessaries, is no offence. 4 Bl. 38. – So, of any of the com. offices of mere humanity, & charity.

Buying, or receiving, stolen goods, knowing them to be such, made no accessory, at C. L. – The offence was a mere misdemeanor. Secus, in Engd. now, by Stats 5 ann. & 4 Geo. I. 1 Hale. 620. 4 Bl. 38. 2 Harr. 450. Cro. E. 888. All. 57. Yelv. 45. 1 Roll. 58.

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By our Stats the receiver is made a principal.

The felony must be complete, at the time of the assistance, to make one an accessory after the fact. Ex. Case of a mortal wound — assistance given before death. 4 Bl. 38. 2 Hawk. 481. (8vo) 1 Hale. 219. 622.

A wife is excused for assisting her husband, (ut dup.) tho' a felon — presumed coercion. But no other relation excuses; as Parent, child, master. &c (4 Bl. 38-9. 2 Hawk. 451. 1 St. 4. 1 Hale. 621. 3 Inst. 108.) & even the husband is not excused in assisting his wife, a felon, the reason of the excuse not existing; - del "Husb. & W." p. 16. s. 2.

If one is indicted as accessory to two principals, proof that he was accessory to one is sufficient. 9 Co. 119 a. 2 McN. 540. 542.

General rule of the C. L. that accessories suffer the same punishment, as principals. (4 Bl. 39. 3 Ing. 188). But accessories after the fact, are now, by Eng. & Stats. allowed the benefit of clergy, in most cases — where the principal, & accessories before the fact, are not.

Formerly holden that an accessory could not be compelled to answer, till the principal was attainted. (4 Bl. 329.) Cont. now holden; but he cannot, now, except by Stat, be tried, (unless he desire it), till the principal is attainted — or,

unless the principal is tried at the same time. 2 Hawk. 453. 455-6. 4 Bl. 40. 323-4. vid Leach. 18. — But by Stat 1 Ann, & 22 Geo: III, the accessory may be tried, in certain cases, tho' the principal has not been attainted, or even tried, (4 Bl. 323-4. 2 Hawk. 453. Leach. 107.) i.e. as for a misdemesnor only. Leach. 107. 353.

If the principal is acquitted, the accessory is discharged. 2 Hawk. 452. 1 Hale. 623-4. 4 Co. 43. And if the attainder of the principal is reversed, that of the accessory is, ipso facto, reversed. 2 Hawk. 452-3. 1 Roll. 777. 9 Co. 119. — Secus, while the first attainder is unreversed, tho' erroneous. 2 Hawk. 452.

But the death, or pardon, of the principal, after attainder, does not, even at C. L, avail the accessory. 2 Hawk. 453. Cro. E. 541. 4 Co. 43-4. Ray. 477. Sy. 120. For neither event proves the attainder unjust, or illegal.

But at C. L. the death &c. of the principal, before attainder, tho' after conviction, discharges the accessory (2 Hawk. 453-4. 4 Bl. 323). Secus, now by Stat. 1 Ann. ante. 2 Hawk. 452. Leach. 107.

If one is acquitted, as accessory, before, or after, the fact; he may afterwards be indicted as principal. But if acquitted as principal, dub. whether he can afterwards be indicted as

accessory before the fact; tho' as accessory after the fact, he may be. 4 Bl. 40. 1 Hale. 625-6. Fost. 365. 2 Harr. 329-30. Is there any sufficient objection to the same course, in first case? For, proof that the prisoner is guilty as accessory, will not support an indictment agt. him, as principal. 2 Mc. N. 495. N.B.

The indictment agt. one, as accessory, need not state that the principal committed the offence — sufficient to state that the principal was convicted of it; & then to charge the prisoner as accessory. 7 T. R. 465. 1 Hale. 625. 2 Mc. N. 454. Foat. 365.

Yet the accessory, on his trial, tho' it be after the conviction of the principal, may controvert the latter's guilt, either in point of fact, or of law. (2 Harr. 455. 4 Bl. 324. Foat. 121. 365. 2 Mc. N. 454-5. 9 Co. 118) For the conviction is res inter alios acta.

So he may when both are tried together.
(2 Mc. N. 453-4.

Felony.

Felony is any offence, which occasions, at C.L. a total forfeiture of goods, or lands, or both 4 Bl. 94-5 The term is generical; i.e. not designating any one specific violation of law, but a whole class of offences - Secus, of the terms, murder, manslaughter &c.

The word did not, originally, denote any crime, but the penal consequences of certain crimes. - Synonymous with forfeiture of a fee, or feud. Afterwards used to signify the offence, working the forfeiture - &, by an easy transition, to denote offences, working a forfeiture of goods only. 4 Bl. 95-7.

5. Treason is strictly a felony, because it works a forfeiture. - anciently comprised under that name. 1 Hawk. 99. 3 Inst. 15. 4 Bl. 94-5. Now, classed by itself, as a crime standing alone, by general usage. 4 Bl. 98.

Capital punishment is not necessarily a consequence of felony - (tho' almost always superadded). Ex. Selfmurder, homicide by chance medley - & petit larceny. vide 4 Bl. 237. 1 Hawk 145. 2 Bac. 476. 1 McNr. 208. 2 Wils. 19.

So. è contra, some capital offences are not felonies: Ex. Heresy, at C.L. - standing mute, when arraigned on indictment. 1 Hawk 99. 4 Bl. 95-7. 3 Inst. 48.

All felonies, which are punishable with death, work a forfeiture of all lands in fee simple, & of goods & chattels. Others, (not so punished), of goods & chattels only. (4 Bl. 97. 381-5. Co. L. 391.) For a fee cannot be forfeited but by attainder.

But, by general usage, the words, felony, is now made to import a capital crime, & indeed, to include all capital crimes, below treason. 4 Bl. 98.

Hence, if a Stat. creates a new felony, the law implies that it shall be punished with death, as well as forfeiture. So, e contra, if the Stat. expressly annexes capital punishment to any offence, that offence is, in consequence, a felony. 4 Bl. 98. 17 Car. 108. 1 Hale. 627. 641. 703. Co. L. 391. 2 Bac. 459. Hob. 293.

But if a stat. prohibit an act, under pain of the perpetrators forfeiting all he has; it is only a misdemesnor. 4 Bac. 644. Co. L. 391. Hob. 270. 17 Car. 107 (old) 108 (8vo). No offence being made felony by doubtful, & ambiguous, words.

Crimes, which, in Eng.d, cause forfeiture, are, in Con.t, called felonies; tho' no forfeiture ensues here, (except in one case, I believe; viz. manslaughter.)

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Clergyable felonies, are those, in which the Benefit of Clergy is allowed. – This is a kind of pardon, in effect, exempting felons, tho' convicted, from the punishment of death. 4 Bl. 368 393. 373. 2 Harr. 236. 1 Ch. Ch. 213. – But their goods are forfeited by conviction, & are not restored. 4 Bl. 373. 387. Its origin, 4 Bl. 365, &c.

At C.L. it was allowed in petit treason, & in most capital felonies; but not in all: – Not in high treason, petit larceny, or mere misdemesnors. 4 Bl. 366. 374. 2 Harr. 479. – Its allowance, in most capital felonies, sanctioned by Stat. 25. Ed. III.° (4 Bl. 374) & extended to petit treason (2 Harr. 479). Still not allowed in high treason, – nor in petit larceny – nor for mere misdemesnors – last two cases, not capital.

Originally allowed only to Clerks in orders, or the clergy – afterwards, to every man, who could read; this being evidence of his being a Clerk. (2 Harr. 474-5. 2 Hale. 372. 4 Bl. 365-7); but not to women; they being excluded by sex, from the clerical office. 4 Bl. 369.

Now, by divers Engl. Stats. especially (Jac. I. 3. 4. 4 & 5 W. & M. & 5. Ann.), the privilege is extended (in case of clergyable offences), to all persons whatever – readers, or not. 4 Bl. 367. 370.

But common persons, taking the benefit of clergy, are, by Stat. 4 H. VII. burnt in the hand, or whipped, or imprisoned, or fined,

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or suffer some other inferior punishment. 1 Mc. N. 214-15. 219. 4 Bl. 373. But Clerks, Peers, & Peeresses, are not burnt &c 4 Bl. 373-4. 1 Mc. N. 217. Foat. 356. by Stat. 1 Ed. VI.

And lay persons are entitled to it, but once — clerks, as often as they commit clergyable offences. 4 Bl. 373. 2 Hale 375. 1 Mc. N. 214 — Statt. 4 Hen. VII. & 1 Edw. VI.

By its allowance for any particular felony, the offender is discharged forever, not only of that, but of all clergyable felonies, before committed. 4 Bl. 374. 1 Mc. N. 217.

At present, in Eng.d, clergy is allowable in all felonies, whether by stat. or C. L., unless expressly taken away by act of Parliament. 4 Bl. 373. 2 Hale. 336.

Benefit of clergy formerly pleaded, in Eng.d (declinatory plea); now prayed before judgment, after conviction, usually. 4 Bl. 332. 2 Hal. 236.

No benefit of clergy, in Con.t

Homicide.

Homicide is the killing of any human creature. 4 Bl. 177. 3 Bac. 551. 1 Harr. 100.

Of homicide there are three kinds;— justifiable, excusable, & felonious. 4 Bl. 177. 1 Harr. 104. 11. 115.

Homicide, therefore, is not necessarily criminal. The first kind has no guilt — the second, very little, even in judgment of law; & only a nominal punishment. 4 Bl. 177. 188. Foat. 283. 2 Harr. 539. 1 Ib. 108-9.

II. Justifiable. This is of several kinds. — 1. Homicide is justifiable, when occasioned by necessity. Ex. Sheriff, in the execution of the duties of his office, executes a condemned malefactor. 4 Bl. 178. 1 Harr. 105. — Legal necessity.

But, in this case, the law must require the act to be done, & it must be done by the person, required, by law, to do it;— or his deputy. For, if a private person, voluntarily, & wantonly, kills a person attainted &c it is murder. 4 Bl. 178. 1 Hal. 497. 501. 3 Bac. 574. 1 Harr. 105.

5. The officer himself, in executing a sentence of death, must pursue the sentence — Secus, guilty of murder. Ex. Beheading for hanging, or vice versa, &c. 4 Bl. 179. 3 Bac. 574. 2 McN. 539. Finch. 91. 1 Harr. 105. Co. L. 128. 1 Hal. 501.

The sentence must be by a court of competent jurisdiction. Ex. If C.B., in Eng.d, or C.C. in Con.t, give sentence of death on a

prosecution for a crime, of which they have not cognisance; & it is executed: — The officers, who execute it, & the Judges, are guilty of murder. 4 Bl. 176. 3 Bac. 574. 10 Co. 76. b. 3 Co. 105. 1 Ham. 105. 130. 1 Hal. 497. 500. Mo. 333. Cro. C. 98.

But if the court has cognisance of the offence, & pass sentence of death, when the offence does not subject to it; the officer is not guilty — bound to obey the order of the law. It is not coram non judice. 1 Ham. 105. 3 Bac. 574.

2. Justifiable, in certain cases, when committed for the advancement of public justice. Ex. An officer, in making arrests, is resisted, & kills: — dispersing rioters; — & this last holds of private persons. 1 Ham. 109. Helg. 76. [Here justified by permission of law, rather than the command.] 4 Bl. 179. Root. 86. 2 McN. 539. 570. 1 Hal. 494. 1 Ham. 105-7. 3 Bac. 574. 9 Co. 68.

So, if an actual felon resists, or flies from, his pursuers, even private persons without warrant. 1 Ham. 105. 2 McN. 559. & Post. 271.

So, if an innocent person, indicted of felony, resists the officer, having a warrant. 1 Ham. 105. Secus, if a private person, without authority, attempt to arrest an innocent person, on suspicion. 2 McN. 572. Post. 318.

Justifiable, when an officer, attempting to make a lawful arrest, in a civil case, is resisted, so that deft. cannot be apprehended alive. 1 Harr. 107. 1 Roll 189. Post. 270. 3 Ins. 55. — So, in other cases, to prevent an escape, or rescue. Sty. 499. Post. 293-4. 2 McN. 560.

3. Justifiable, to prevent any forcible & atrocious crime: Ex. one attempting to murder, or rob another, is killed. So, breaking a house, in the night. Scens of crimes not accompanied with force: as, picking pockets, — mere breaking house, in the day. 4 Bl. 180-1. 3 Bac. 675. 1 Harr. 108-9. 1 Hal. 485-7. 493-4. Hely. 137. Post. 271-5. 2 McN. 562.

Not justifiable, when merely to defend one's house, goods, or person, from a bare trespass. 4 Bl. 180-1. Post. 273. Cro. C. 538. 1 Harr 108. 109. 1 Hal. 485-6-8. — Tho', if the trespass is agt. his person, it may be excusable, se defendendo (Post). 1 Harr. 108. 113-4. 4 Bl. 184-5.

If the trespass is agt. property only, it is manslaughter. (So, if he kill one, breaking his windows, to arrest him in a civil case. 1 Harr. 108. — May it not be homicide se defendendo, in the last case, i.e. if he cannot otherwise escape death, or great bodily harm? 4 Bl. 185.)

General principle is this: When a crime, itself capital, is attempted with force; the force may be lawfully repelled, by the death of the party. Here the homicide is justifiable. 4 Bl. 181.

Justifiable Homicide

A woman may lawfully kill one, who attempts, with force, to violate her chastity. 4 Bl. 181. 1 Hawk. 108-10. Foster. 274. — So, husband, or parent, may kill a ravisher. 1 Hawk. 108. 4 Bl. 181. 1 Hal. 488. Hely. 137. n. 2 Mc & N. 502. — So may any other person, I suppose. 1 Hawk. 109. 3 Inst. 198. — analogy to ca. of riders.

According to the old opinions, justification of homicide may be specially pleaded. Later opinions are, that it must be given in evidence, under the general issue. 1 Hawk. 105. 3 Bac. 675-6. 1 Hal. 478. (always agreed, that an excuse cannot be pleaded 1 Hawk. 105. (70. fol.)) — Special plea in bar would amount to the general issue.

Justifiable homicide not punished at all — not even nominally. 4 Bl. 182.

III. Excusable Homicide.

Difference between justifiable & excusable, — one lawful, the other venial. 4 Bl. 182.

Of 2 kinds. 1. Per infortunium — by misadventure. — 2. Cse defendendo — in self defence. 4 Bl. 181. 1 Hawk. 111. 1 Hal. 38. 41. 393. 492.
The first purely involuntary — the second, voluntary, but committed from motives, & under circumstances, constituting an excuse 3 Bac. 670. 1 Hal. 471.

1. By misadventure: Happens, where one, doing a lawful act, without any design to do hurt, involuntarily kills another. Lawfulness of the act, is essential. Ex. Using an axe, - head flies off. So, a third person whips a horse, which kills another; - rider guilty of homicide by misadventure; - whipper of manslaughter, at least. 1 Hawk. 111. 1 Hal. 472. Post. 258-9. 4 Bl. 182-3. 3 Bac. 476. Hely. 40-1.

A parent, in reasonably correcting a child, accidentally kills him - master - school master - of. It is by misadventure. 4 Bl. 182. 1 Hawk. 111. Hely. 64-5. 133-4. Post. 262. 5 Mod. 287. Skin. 658. 1 Hal. 454. 473-4. 2 McNr. 355-7.

So, of an officer, corporally punishing a convicted criminal - excusable. If, however, the beating is outrageous, it will be manslaughter, at least: If with an instrument apparently endangering life, - murder. 1 Hawk. 111. Hely. 64-5. 133. Post. 262. 1 Hal. 454. 474. 2 McNr. 355-7.

But if death accidentally ensue, in consequence of an unlawful act, which is malum in se; the author is guilty of manslaughter, at least - in some cases, of murder. 2 McNr. 333-4.

Distinction: If the act is trespass only, it is manslaughter; if felony, it is murder. 3 Bac. 575-7. 1 Hawk 112-13. 126-7. Hob. 134. 4 Bl. 183. 192-3. 1 Hal. 472-5. Post. 258. 292. Str. 499. Hely. 117.

Excusable Homicide.

If one accidentally kills another, in the execution of a malicious or deliberate purpose to do him personal hurt; it is murder. Hely. 117. 1 Hawk. 112. 4 Bl. 200. 1 Hal. 39. 475.

So, if it be in consequence of any unlawful act, which naturally tended to bloodshed. 4 Bl. 193. Hely. 113-14. 1 Hawk. 112.

So, if one does an idle act, which must, manifestly, endanger the person of some one, & accidentally kills; it is manslaughter: Ex. Throwing stones at another in sport: This is an unlawful act. 1 Hawk. 112. 131. Str. 481. Fost. 261. 4 Bl. 183.

But if death accidentally happen, in consequence of any lawful sport, as foot-ball, wrestling, &c. it is by misadventure, only. 1 Hawk. 112. Fost. 260. 2 Mc. N. ~~204~~ 534.

2 In self defence: This takes place where one in a sudden affray, kills his assailant, in his own defence. 4 Bl. 183-4. 3 Bac. 677. This is excusable. (Distinct from that, which is committed to prevent the perpetration of a capital crime.)

Said not to be material, who gives the first blow, if he, who kills in self defence, is forced to fight. 3 Bac. 677. — Du. Not. law. sent. p. 29.

But to excuse this kind of homicide (when voluntary), it must appear to have been the only possible, (or, at least, probable), means

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of preserving ones own life (4 Bl. 184-5. 3 Bac. 677. 1 Hawk. 108-10. Kely. 128. 2 McNally 383. Fost. 273.): or, at least, of escaping great bodily harm. 1 Hawk. 108. 113. 4 Bl. 185.

When it is to preserve ones life, it seems nearly akin to justifiable homicide, committed to prevent a forcible & atrocious crime. 4 Bl. 183-4.

Difficult, often, to distinguish from manslaughter: General rule: If both are fighting (i.e. striving for victory, when the mortal blow is given; it is manslaughter: But if the slayer has not begun to fight, or having begun, tries to decline, & cannot without danger to his life, or, of great bodily harm; it is Se defendendo. 4 Bl. 184. Fost. 277. 3 Bac. 677. 1 Hal. 481. 3 Inst. 56. vid. Kely 57.

According to Some, the aggressor himself, when pressed (ut. sup.) & trying to escape is excusable in killing to save his own life (3 Bac. 677.) non holden contra, it seems; for it is his fault. 1 Hawk. 113. 1 Hal. 479-80-2. Kely 58. 61. Fost. 276-8. 295. 4 Bl. 183-6.

And if one strikes, with malice prepense & having fled, & tried to decline, kills the other, even to save his own life; it is murder. 1 Hawk. 113. 129. Kely. 58. 128-9.

If two agree, beforehand, to fight a duel, & one being pressed, (ut. sup.) kills the other, he is not excused: It is murder; for there

was previous malice. 3 Bac. 677-8. Hely. 129-31. 4 Bl. 185. 1 Hal. 445. 479. 1 Harr. 112. 122-3-4.

Same rule applies to cases of fighting, in general, by a preconcerted agreement; i.e. where it is not all one continued act of passion. 1. Harr. 125-6. 112. 122. Hely. 117. 1 Hal. 39. 475.

So, the seconds of him, who kills in a duel, are murderers; & according to some, the others seconds. 4 Bl. 199. 1 Harr. 124. 1 Freem. 314. 1 Hal. 443. 3 Bac. 565-6.

This excuse of self defence extends to the chief civil & natural relations. Ex. Husb. & W. (Hely. 137.) Parent & child, Master & Servt. — The act of the relation is construed the act of the party attacked. (4 Bl. 186. 1 Hal. 484-6. 3 Bac. 566. 675.) as to prevent great bodily harm (sup.) — A stranger may justify homicide, only to prevent a forcible capital crime. secus not. Hely. 61. 1 Harr. 125.

Killing an officer, who attempts to arrest the slayer, in the execution of his office; not excusable — murder. (So, tho' the warrant is irregular, & illegal, if good upon the face of it. 2 McN. 488-9. 501. 7 T.R. 435.

None can excuse the killing of another, by pleading misadventure, or self defence. It must appear in evidence, under the gen^l issue. 3 Bac. 676. 1 Hale 478. 1 Harr. 105. 115. F.N.B. 246. Co. L. 283. (See 7.20. that

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such a plea would be ill, as amounting to the general issue.

Punishment:- Excusable homicide, whether by misadventure or se defendendo, is said by Coke, to have been anciently punished with death. 2 Inst. 148. 315. Denied by later writers. 4 Bl. 188. 1 Hal. 425. 1 Hawk. 114. Fost. 282. re.

The punishment seems to have consisted, anciently, of a total, or partial, forfeiture of goods & chattels. 4 Bl. 188. 1 Hawk. 115. (If total, the offence would be felony, which Blackstone says it is. 4 Bl. 95-7. 1 Hawk. 114. 2 Id. 447.) It seems to be, strictly, (by the ancient law, at least), a felony; but is not classed with felonious homicide because not capital. Felony being now used as synonymous with capital crime. 4 Bl. 98.

But as far back, as Eng.h records reach, the party has ever been, as he still is, entitled, of course, & of right, to pardon, & restitution of goods: So that the punishment is, at worst, but nominal. 4 Bl. 188. Fost. 283. 1 Hawk. 115. 2 Id. 398-9. Hely. 58.

Indeed the Eng.h judges usually direct, or permit, a general verdict of acquittal. 4 Bl. 188. Fost. 288.

No accessories, in excusable homicide, because not felonious. 2 Hawk. 447. 1 Hale. 615-16.

III Felonious Homicide. This is the killing of a human creature without justification, or excuse; & may be committed by killing either one's self, or another. 4 Bl. 188. 1 Hawk. 102.

1. Homicide by killing one's self, is called self-murder, — the party, felo de se. 4 Bl. 189. 1 Hawk. 102.

Felo de se is one, who deliberately puts an end to his own existence; or commits any unlawful malicious act the consequence of which is his own death. Ibid. & 1 Hale. 413. Ex. One attempting to kill another, the gun bursts, & kills himself. Ibid. & 3 Inst. 54.

If one requests another to kill him, & it is done; the former is not felo de se; but the latter is a murderer. A pact, or request, utterly void. 1 Hawk. 103. Mo. 734. — Qu. whether correct, on principle?

A person, to be a felo de se, must be of years of discretion, and compos mentis: as in other felonies: not infants under 7 — lunatics, &c. 4 Bl. 189-90. 1 Hale. 412. 1 Hawk. 102. 3 Inst. 54.

It admits of accessories before the fact, not after. Ex. One persuades another to this crime, — guilty of murder. 4 Bl. 189.

The consequences, at C. L., are ignominious burial in the highway (intrahea) — forfeiture of all goods & chattels — secus of his lands, for no attainder. 4 Bl. 190. 387. 1 Hawk. 103. 2 Inst. 215. 1 Hale. 413. Doug. 524.

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Flor. 243. 259. 262. 323. Ray. 7.) These indignities have, in most cases, been eluded — now abrogated by Eng.t Stat. (1823.) In Con.t no such consequences, I suppose.

2. The second kind of felonious homicide consists in killing another person, without justification or excuse, & is either with, or without, malice. 1 Harr. 115. Fost. 2. 5. 4 Bl. 190.

Hence two kinds: Manslaughter, & murder; the one, with malice — the other, without. 1 Harr. 115. 4 Bl. 190. 1 Hal. 466. — Malice is any unlawful, or wicked, motive. 4 Bl. 198-9. an "evil design", Fost. 256.

First of manslaughter: It is the unlawful killing of another, without malice, express, or implied, (1 Hal. 466. 4 Bl. 191.) & is either voluntary, or involuntary.

No accessories before the fact — unbremeditated. 4 Bl. 191. 1 Harr. 115.

As to voluntary: If two persons, upon a sudden quarrel, fight, & one kills the other, it is manslaughter — (So, if they immediately go aside, & fight) — for it is one continued act of passion. 4 Bl. 191. Fost. 297. Kely. 115. 134-5. Leach. 157-5. 2 Mc.Nr. 563-8. Different from the case of duelling by previous agreement. — There is a deliberate intent to kill — previous malice, & so murder. (So, semb. in case of preconcerted agreements to fight, generally.) 1 Harr. 112. 122-4. Kely. 50. 131.

Felonious Homicide.

If a person attempting to part others, who are fighting upon a sudden affray, is killed; the offence is murder — provided the slayer knew, or had notice, that the object was to part them. Secus, manslaughter. Hely. 66-7. 114-5. 1 Hawk. 127-8. Fost. 310 372. 9 Co. 61-b. 81. 2 McN. 561.

If one is greatly provoked by another's misconduct, as pulling his nose, or other great indignity, & immediately kills him: manslaughter generally. 4 Bl. 191. Hely. 135-6. 1 Hawk. 127 n. 125. 1 Hal. 470.

Secus, if sufficient time elapses for passion to subside; — then murder. 4 Bl. 191. Fost. 294-5-6. 310. — So, in every case of homicide upon provocation. Hely 27. 55. 2 McN. 567. 1 Hal. 486. Ray. 212. 1 Vent. 158.

So, if on a sudden provocation, one executes his revenge immediately, but in such a manner as manifests a deliberate intent to kill, or do other great bodily harm, & death ensues, even accidentally, it is murder. Ex. Tying a boy to horse's tail. Parent correcting a child, in an outrageous manner, 1 Hawk. 126. Cro. C. 131. Salm 345. Hely. 127. 1 Hal. 454. 473-4. Fost. 292. 4 Bl. 199. 2 McN. 564-5.

If a husband take a man in the act of adultery with his wife, & kills him instanter, — manslaughter, in the lowest degree. 4 Bl. 191-2. 1 Hal. 486. Ray. 212. Hely. 137. 1 Hawk. 128. 1 Vent. 158.

Bare words, or gestures, - breaking promise - treasp. on land - never a sufficient provocation to reduce, even a sudden killing to manslaughter; where the killing is voluntary, or the manner of beating manifests endangers life. 1 Harr. 124. Hely. 130-1-5. 1 Hal. 455-6. 478. Cro. E. 779. Noy. 171. Fost. 290. 316. 5 Bl. 7.

Scows, if it appears, clearly, from the manner of beating, that he intended only to chastise; so that the killing was unintentional. 1 Harr. 124-5. 1 Hal. 455. Fost. 291-5. 4 Bl. 200. 2 McV. 564.

If upon an affray between A. & B. the friend of A. suddenly interposes, & kills B. he is guilty of manslaughter only, No malice prepense. Hely. 136. 6. 12 Co. 97. Fost. 315 &c. (Qu. Is not this rule too general? 1 Harr. 125.)

Manslaughter, on a sudden provocation, differs from homicide se defendendo, in this: In the latter case, there is an apparent necessity, for self preservation. In the former, no necessity — act of sudden revenge. 4 Bl. 184. 192.

As to involuntary: This, as the term imports, is always unintentional; but ensuing upon some unlawful act, malum in se. 4 Bl. 192. 1 Harr. 11-12. Fost. 258-61. 2 McV. 333. - Differs from homicide by misadventure, in this; that the latter ensues upon a lawful act. 4 Bl. 192. Comp. 830.

Felonious Homicide.

If death ensue upon an act, which is merely malum prohibitum, the rule is the same, as if the act were lawful: i.e. the homicide is by misadventure. Fost. 257. 1 Hal. 475-2 McN. 553-4.

2. If one accidentally kills another, while engaged in any unlawful, idle, & dangerous, sport, (as by sword-playing &c), manslaughter. These are unlawful acts. 4 Bl. 183. 192. 3 Inst. 56. 1 Hal. 472-3. Fost. 261. 292. 1 Haw. 112. Hob. 134.

So, if an act, in itself lawful, is done in an unlawful manner; for here, under its circumstances, the act is unlawful. Ex. Throwing down a piece of timber, or a stone, into the street, in a city, tho' the person gives warning. Hely. 40-1. So, shooting a gun where people usually resort. Id. & 4 Bl. 192. 1 Haw. 112. Str. 481. 1 Hal. 472-3 5. Fost. 263-292. 2 McN. 556-7-8.

If the unlawful act is a tresp. only, the killing is manslaughter: If felony, it is murder. (ante) 4 Bl. 192-3. 1 Haw. 126-7-8. Hely. 111. 117. Fost. 258. 292. 9 Co. 91. Flow. 457.

Punishment: It is a clergyable felony - eras, not capital, in Eng., in the first instance. But the offender forfeits all his goods & chattels, & is burned in the hand - land not forfeited, because not capital - no attainder. 4 Bl. 193. 201. 387.

Felonious Homicide

In Con^t. it is punished by stat. (when voluntary) with forfeiture of goods & chattels to the State — whipping — branding — & disability to give verdict or evidence. — Involuntary, not within our state. — What, at C. L. is involunt^y manslaughter, is, in Con^t. but a misdemesnor. (V. Haven C.^t July Term 1801. State v. Rogers) But voluntary may still be punished here, as at C. L.

Murder.

This name was anciently applied to the secret killing of another, for which the vill, or, if too poor, the hundred, was amerced. 4 Bl. 194-5. 1 Hawk. 117. Hely. 121-4. 1 Hal. 447. Fost. 281. 3 Bac. 661.

Murder is now described thus: Where a person of sound memory & discretion, unlawfully kills any reasonable creature, in being, & under the peace, with malice aforethought, express, or implied. 3 Inst. 47. 4 Bl. 195. 1 Haw. 118. It is: The unlawful killing of another, with malice prepense.

Difference between this, & voluntary manslaughter: The latter proceeds from sudden passion; The former, from wickedness & malice. 4 Bl. 190.

"of sound memory" &c. So must every offender be, to be punishable. 4 Bl. 20. 25.

Felonious Homicide

"Unlawfully kills another" &c. Unlawfulness arises from killing without warrant, or excuse. Must be actual killing; assault with intent to kill, is a misdemeanor only; tho, formerly, murder. 1 Hale 425-6. 4 Bl. 196. 3 Bac. 564.

Not only directly & forcibly taking away life, (as by a blow, or stab,) is killing within the definition; but 1st any act, of which the probable consequence is death, & which eventually occasions death; & which is wilful & deliberate, is murder. Ex. Poisoning. Starving &c. 4 Bl. 196. 1 Hawk. 118. 3 Bac. 562. Palm. 548. Modes of killing indefinitely various. Str. 854. Leach. 441.

So, of a son, who carried out his sick father, agt. his will, in a cold frosty season. So, of the woman, who left her child in the field, covered with leaves only, & it was stricken by a kite. This is killing, and murder. 1 Hale 434-2. 1 Hawk. 118. 4 Bl. 197. Palm. 545. — So, parish officers who shifted a child about, till it died. 4 Bl. 197. Leach. 141. So, a gaoler, knowing a prisoner to have an infectious disease, wantonly confines him with another, who takes it, & dies. 1 Hawk. 119. 3 Bac. 563. Str. 856. So, if he wantonly confines a prisoner in a low, unwholesome, room, denying common conveniences. 1 Hawk. 119. Str. 883-4. L.R. 1578. 1 Bal. 456.

If a person, having a beast, used to do violent mischief, suffers it to go abroad, or turns it loose, even to frighten people, & it kills, the owner is guilty of the killing; & in the 1st case of manslaughter, in the 2d of murder. 4 Bl. 197. Palm. 431. 1 Hale 430-1. 517. 1 Hawk. 118. 3 Bac. 563-4.

Felonious Homicide.

2. So, in some cases, where the actual killing is by another. Ex. If one incites a madman to kill another (or lays poison for A, & B takes it.) 1 Hawk. 118. Flor. 474. 9 Co. 81. (Or, by duress of imprisonment, compels another to accuse an innocent person, who is condemned to death on the latters evidence. Stat. 14 Eliz. III). 1 Hawk. 3. 118. 3 Inst. 91. 1 Hal. 431-6. 442. 467. 3 Bac. 603. Flor. 19. a. Kely. 53.

Whether bearing false witness, with intent to take away one's life, is such a killing, as to amount to murder, at C. L, provided the innocent person is condemned & executed — Qu. Leach. 44. Fost. 132. It was, by the ancient C. L. — no instance for many ages. 4 Bl. 196-7. Fost. 131-2. 1 Hawk. 119 n. 3 Inst. 48.

In Con. by Stat. bearing false witness wilfully, & of purpose to take away any mans life, is punished with death.

If a Physician gives a potion to cure, but which kills; homicide by misadventure only. But it has been holden, that if the person be not a regular Physician of, it is, at least, manslaughter. 3rd Qu. 4 Bl. 197. 4 Inst. 251. 1 Hal. 430. 3 Bac. 604. 1 Hawk. 131.

But no person can be adjudged to have killed another, in law, unless the death happen within a year & a day, &c. in computing which, the whole day, on which it is to be reckoned & the first. 4 Bl. 119. 3 Bac. 60.

But if he dies within that time, no excuse, that he might have recovered, if he had not neglected of. 1 Ham. 79. 3 Inst. 53. Kely. 26. 1 Hob. 17. 1 Hal. 428. But if the wound, or hurt, be not mortal, & the party is killed by the remedies used, & not by the wound of, not homicide: But this must appear clearly. 3 Bas. 1665. 1 Hal. 428.

A person, indicted for one species, or mode, of killing, not convicted, by evidence of a totally different species. Ex. Poisoning for shooting, – starving, for drowning of: Secus, when they differ only in circumstance. Ex. Wound given with an axe, club, &c, but alleged to have been given with a sword. 4 Bl. 195. 3 Inst. 319. 2 Hal. 185. 291. 2 McN. 520-2. 9 Co. 67.

10. But if several are indicted, A. as giving the blow, & B. as present aiding of, evidence that B gave the blow, & that A. was present, aiding of, will maintain the indictment. 1 Hal. 437-8. 2 Ld. 232. 9 Co. 87. 112. 4 Co. 42-5. 1 Flow. 98. 2 McN. 522-5. 529. – For both are guilty as principals, the difference is only in circumstance.

The indictment must state, that the Prisoner gave the deceased a mortal wound, or bruise (Leach. 98). i.e. I suppose, where the means employed were violent, as stabbing, striking, &c. – Secus, of poisoning, starving, &c. I conclude.

Felonious Homicide.

"A reasonable creature, in being, & under the peace." Aliens, and outlaws, are within the rule — killing any person whatever, except an alien enemy, in time of war, with malice prepense, is murder. All others are "under the peace." 4 Bl. 197-8. 3 Inst. 57. 1 Hal. 433. 3 Bac. 665. 1 Harr. 121.

Killing a child in ventre sa mère, is a great misprision only, — not in rerum natura for this purpose. 3 Bac. 665. 4 Bl. 198. 1 Harr. 121. (Misprision is a "high" offence, under the degree of capital, but bordering upon it. 4 Bl. 119. Hely. 71. 1 Hal. 374. 1 Harr. 85.

But if the child be born alive, & afterwards dies, within a year & a day, of the wound &c, received in ventre sa mère, it is murder, by the better opinion. 4 Bl. 198. 1 Harr. 121. 3 Inst. 57. 1 Hal. 433 cont. But the death must be within a year & day. 4 Bl. 197.

Epithet "reasonable", in the definition, means "human: — not, "having the faculty of reason" — madmen, idiots &c are within the definition. Inciter of a madman to kill himself, guilty of murder, — as principal. 1 Harr. 118. 1 Hal. 431-5.

If one counsels another to kill a child in ventre sa mere, & being born, it is killed, in pursuance of, he is accessory to murder. 1 Harr. 121. by. 185. 3 Inst. 57. Hely. 127. 1 Hal. 429. 433.

Felonious Homicide.

By Stat 21. Jac. I. & by the late Stat. law of Ont., if the mother of a bastard child, (found dead), endeavours to conceal its death by burying it privately, or in any other way; deemed guilty of murder, unless she can prove, by one witness at least, that it was born dead. 1 Harr. 521. 3 Bac. 683. 2 McN. 381. — Now, the former stat. of Ont. repealed: Punishment, under new Stat. sitting on gallows, &c. — binding to good behaviour, — & imprisonment, at the discretion of the Court.

The construction, practically given to these stats. here & in Eng., makes necessary to the mother's conviction, presumptive evidence, at least, that the child was born alive. 4 Bl. 198. 2 Str. 303-4. 1 Hely. 32. 2 Harr. 519. 2 McN. 382.

"With malice aforethought, express or implied" — grand criterion — it is not necessarily, spite, or malevolence to the deceased; but evil design in general; the dictate of a wicked, depraved, malignant, mind. 2 McN. 348. 4 Bl. 198-9. Stat. 250. 2 Rol. R. 461. Hely. 126-7.

"The court, not the jury, are judges of the malice" (L. R. 1493. 2 Str. 773-4. Burr. 396. 474. 937. 3 T. R. 412.) — i.e. of what amounts, in law, to malice — so that, the facts being given, the point is a question of law. 2 McN. 547, &c.

Malice fore-prepense is express, or implied. Said to be express, 1st, when one, with a deliberate, & formed, design to kill, or otherwise

personally to injure, some particular individual, kills him, in executing that design: Lying in wait, – former menaces, – old grudges, &c. are evidence of that formed design. 1 Hal. 451. 1 Hawk. 121-2. 3 Bac. 566. Kely. 127-30.

2nd Where one kills by an act, which indicates enmity to all mankind. Ex. By shooting into a crowd: This is express. 4 Bl. 199-200. Foster. Fost. 251. 3 Bac. 565. 1 Hal. p. 46.

Distinctions not well taken by Blackstone. Express malice p. 45.
seems to me to be, that, which, in point of fact, concurs with the act of killing – implied, that, which so concurs, only by implication of law. (1 Hawk. 122.) Ex. 1. Discharging a ball, with intent to kill, or hurt, J. S. or whomsoever, it may strike. – 2. Doing same act, with intent to kill, a feal, an ox.

So, in the case of deliberate duelling, it is express. 1 Hawk 122. 1 Bulst. 85-7. Kely. 129. – No excuse, that the party slain attacked first, – or that the intent was, not to kill, but disarm: for the deliberate design to obtain the mastery, is express malice. 3 Bulst. 171. 1 Hal. 452. 3 & 4 Bl. 199. Kely. 271. 3 East. 581. Fost. 295-7. 2 McN. 508.

So, the seconds of the person killing, are guilty of murder, by express malice; – & according to some, those of the opposite party. Id. 4 Bl. 199. 1 Hawk. 124. Green. 574. 1 Hal. 443. 451.

Giving a challenge is, at C. L., a high misdemeanor. 3 East. 581. Here, the punishment is prescribed by stat.

If a person, upon no provocation, or a slight one, suddenly attacks one & kills; it is murder by malice express. Kely. 27. 55. 127-9. For so cruel & ferocious an act, in such a case, is evidence of hardened, deliberate, malignity towards the deceased. 1 Hawk. 124. Fost. 255. (Bl. calls this implied malice 4 Bl. 200. Qu. It seems to me express.)

So, generally, if on even a sudden, & great, provocation, one beats the other in a cruel, & unusual, manner, & kills him; it is murder by express malice. 4 Bl. 199. Ex. Boy tied to horse's tail &c. 1 Hal. 454. 473-4. Kely. 127. 1 Hawk. 125. Cro. C. 131. Palm. 545.

So, if on a sudden quarrel, he, who kills, seems to have been master of his passion, at the time; it is murder, & the malice is express. 1 Hawk. 128. Kely. 55.

If one, committing a breach of peace, (as by fighting &c.) suddenly kills an officer of the peace, who attempts to suppress it, he is guilty of murder. 1 Hawk. 127. Kely. 55. 2 McN. 569-73. 3 Inst. 52. 4 Bl. 40. 9 Co. 68. Fost. 308. 310.

So, of a private person, acting in aid of the officer; or, if no officer be present. Hely. 66. 110. But the object of the interference must be made known — except in the case of an officer, known to be such — acting within his district — Secus only manslaughter. 1 Hawk. 127.

II. Malice is implied, when the killing is in consequence of an unlawful act, intended altogether, or principally, for some other purpose than that of killing the person slain. 1 Hawk. 122-6. 4 Bl. 200-1. Ex. One shoots at a fowl, with intent to steal, & kills a person accidentally — or, shoots at A. & kills B; — or, lays poison for A. which B. takes, &c. Id. & Hely. 111-17. 1 Hal. 465-474. Mo. 87. Flow. 101. 3 Bac. 667.

But the intended act must be felony, — Secus, the killing is, regularly, manslaughter. 3 Bac. 676-7. (667) 1 Hawk. 112-19. 126-8. Hely. 111-17. 4 Bl. 183. 192-3.

Express malice seems to be that, which, in point of fact, concurs with the act of killing the person slain. Implied, that, which so concurs only by implication of law. 2 McN. 549. 2 Hawk. 122-6. — Ex. sup: &, one gives poison to a woman, to procure abortion, & it kills the woman — malice implied. 4 Bl. 201. 1 Hal. 429. Qu. Is the act intended felony? 43.

Husband gave his wife a poisoned apple, to kill her — She gave it to her child, & killed it, not herself — Implied malice. 1 Hawk. 125. Flow. 473.

(over)

Felonious Homicide.

3 Inst. 51. 9 Co. 81. Jenk. 535. 1 Hal. 435. 441. 467. 2 McN. 534-5-6. Fost. 261. Hely. 111. L.R. 158, or 1581.

But when one kills, in consequence of such an act as indicates enmity to all mankind, tho' not to the deceased, in particular, it is express. Ex. Wilfully shooting into a collection of people, & killing one. 4 Bl. 199-200. 2 McN. 534. L.R. 143. 1 Harr. 113. 1 Hal. 476. 3 Inst. 57. Fost. 261-2. Here the intent: concurs with the act of killing. — the intent being to kill any one, whom the ball might strike. p. 43.

If one kills an officer, in a struggle to escape from lawful arrest, it is murder by malice implied. Design was, principally, to escape. (1 Harr. 125-9. 1 Hels. 86. 130. 1 Hal. 463. Fost. 29. 135. 308) — not to injure the officer.

In the last case, it is no excuse, that the process was erroneous — not void, by being fo.

Same rule, tho' the officer did not inform, for what cause he was about to arrest. So, tho' the officer (if he was a public one), did not show his warrant, beforehand. 1 Harr. 129-30. (60-5-8) or 9 Co. 66-8. Fost. 137. 311-2-8. Cro. J. 280. 486. 2 McN. 571.

All homicide is presumed to be malicious — Onus probandi is on the accused. 4 Bl. 201. 9 Co. 66-7. Fost. 255. 1 Harr. 124. Hely. 27. 112. 2 McN. 545. =

= Therefore, all homicide is murder, of course, unless; 1st Justified by command, or permission, of law: 2nd Excused, on ground of misadventure, or self defence; or, either the involuntary consequence of some unlawful act, not amounting to felony, or occasioned by some sudden & violent provocation. 4 Bl. 201.

If several are engaged in a preconcerted unlawful act, & one of them, in execution of the general design, kills a third person, they are all guilty of murder. Secus, if the killing is not in execution of the common design, & the others do not aid, or consent to, it. Then, the slayer only is guilty. Hely. 113. 1 Hal. 351. (So, if the unlawful act is not preconcerted, as in a sudden affray. Hely. 115.)

Punishment of murder is death: Originally, clergyable. (So that unlearned offenders, only, were capitally punished.) 4 Bl. 201. 1 Hal. 450.

Now, by 3 Eng. stats. 23 Hen. VIII. 1 Edw. VI. 4 & 5 Ph. & M., Clergy is taken away from murderers, their abettors, procurers, & counsellors. 4 Bl. 201. 2 Hav. 488-9. 631. 3 Inst. 53. 2 Hal. 399. — These stats. seem not to extend to accessories after the fact. —

In Con. it is death, by stat. — Judgment that he be hanged by the neck, till he is dead. 2 Hav. 631. 2 Hal. 399. 3 Inst. 57. 211. 4 Bl. 403.

A woman condemned during gestation (quick with child), execution is respited, till her delivery. But this is no excuse for not pleading — or, for judgment being delayed. 2 Hav. 658. Finch. 478. 3 Inst. 17. 2 Hal. 413. 4 Bl. 395. But respiting for this cause can be had but once.

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As to becoming insane, see J. J. – 4 Bl. 395.

Execution is not complete, till the convict is dead – on revival, he must be again hanged: Former hanging being no execution. 4 Bl. 405. 2 Hal. 412. 2 Hawk. 558. Finch. 467.

N.B. When one murders an officer, endeavoring to arrest him, the prosecutor is not bound to show that the deceased was an officer, otherwise, than by proving that he acted as such. 4 T. R. 366. 2 Mc N. 498. Qu. May not the prisoner then prove that the deceased was not an officer? I trust he may: The rule relates, only, to the proof, necessary to be adduced, by the prosecutor.

Petit Treason

There are certain instances, in which, murder, as being more than ordinarily heinous, is denominated petit treason. It is, indeed, no other than murder, in it most odious form, & degree. 4 Bl. 202-4. Fost. 107. 324. 336.

At C.L., many offences were called petit treason, which are not now. Ex. Privacy by a subject – grand jurors discovering the Kings counsel. Wifes attempting to kill her husband &c. 1 Ham. 131. 3 Inst. 20-1. 1 Hal. 377. 382. 5 Bac. 140.

Now, by Stat. 25 Edw. III, no offence can be petit treason, except in the following instances: 1. Where a Servant kills his master – 2. Wife, her husband. 3. In Eng.d an ecclesiastic, his prelate. 5 Bac. 141-3. 4 Bl. 203. 1 Ham. 131. 2 McN. 574-5.

Called Treason, by reason of the violation of private allegiance – in addition to murder. 4 Bl. 203. Fost. 107. 324. 336.

12 Killing of a husband &c not petit treason, unless under such circumstances, as would make the killing of another person, murder. 5 Bac. 141. 1 Ham. 132. Dy. 284. 1 Hal. 378. 380: As petit treason includes murder. 2 McN. 574-5.

If a wife, divorced a mensâ &c. kills her husband; petit treason: Secus, if a vinculo &c. 4 Bl. 203. 1 Hal. 380-1. 1 Ham. 133-n. 5 Bac. 141.

If a wife procure a stranger to murder her husband, being herself absent, at the time, she is accessory to murder only: But if a stranger procure the wife to do it, he is accessory to petit treason. p. 13. 5 Bac. 142. 3 Inst. 20. 139. 1 Hal. 24-5. 1 Hawk. 132. Dy. 128. 332. For the nature of the accessory's guilt follows that of the principal.

Murder of one's mistress, or master's wife, petit treason, tho' not within the letter of 25. Edw. III. 5 Bac. 142. 3 Inst. 20. Flow. 86. 1 Hawk. 132.

So murder of one, who has been master, upon malice, conceived during the service, is petit treason; because in execution of a treasonable intention. 1 Hawk. 132. Flow. 250. 1 Co. 99. 5 Bac. 142. 4 Bl. 211. Murder of a Father by a child, not held treason, unless the latter is by a reasonable construction, a servant to the father. 1 Hawk. 131-2. 3 Inst. 20. 1 Hal. 380.

Originally clergyable: Clergy taken away by 12 H. VII. from aiders abettors, & counsellors - by 23 H. VIII. 4 & 5. P. & M. 4 Bl. 204. 5 Bac. 141-4 & 5. P. & M. takes it from accessories after the fact. 1 Hawk. 133.

Punishment, in case of a male, to be drawn to the place of & hanged: Female, to be drawn of & burnt. 4 Bl. 204. 1 Hal. 382. 2 Id. 399. 3 Inst. 31. 2 Hawk. 531. 1 Id. 133.

On an indictment for petit treason the prisoner may be convicted of murder. Leach. 399.

Arson.

Arson is the malicious & wilful burning of the house, or out-house, of another. 4 Bl. 220. 1 Hal. 550. 3 Inst. 66. 2 Ld. 188. Leach. 218.

Not only the bare dwelling house, but all out houses, that are parcel of it (i.e. within the curtilage, or homestall), as barns, stables &c. may be the subject of arson. 4 Bl. 221. 1 Hal. 567. 2 Ld. 20. 1 Ham. 185.

So, a barn, filled with corn, is within the definition, tho' not parcel of. 4 Bl. 221. 1 Ham. 183-6. 3 Inst. 69. – Burning a stack of corn anciently arson – not now. 4 Bl. 221. 1 Ham. 185.

Burning the frame of a house is not arson, because not within the meaning of "domus". 1 Ham. 186. 1 Hal. 568. 3 Inst. 167. 1 Burns. 259. Burning a prison is arson, being the house of the corporation which owns it. Leach. 67.

Arson may be committed by burning one's own house, (it is said), if another's house is burnt in consequence of it. But here, the offence consists in burning the latter. 4 Bl. 221. Cro. C. 377. 1 Ham. 186. Leach. 217-19: For, if one, seised for fee, or possessed for years only, of a house standing at a distance from all others, burns it; not arson. 1 Ham. 188. Cro. C. 377. 1 Son. 357. Fost. 116.

And if one, so seised, or possessed, in town, burns his own, with evident intent to burn another's, but actually burns his own only, not arson. 1 Ham. 188. 1 Hal. 568-9. 4 Bl. 221. Kely. 29. Fost. 115-16. Cro. C. 378.

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= By much the stronger opinion — East. 217-19. Hely. 29. (So, if he is in poss.n, under an agreement for a lease for years. East. 29. So, of tenant from year to year. East. 235.

But the wilful firing of one's own house, in a town, is a high misdemeanor; incurring fine, imprisonment, pillory, & sureties for good behaviour during life. 4 Bl. 221. 1 Hal. 568. 1 Ham. 165. Hely 29. The indictment should not be for arson. Hely 29.

If a landlord, or reversioner, burn his own house, while in poss.n of his tenant; it is arson: It is, pro tem, tenant's house. 4 Bl. 221. Post. 115. 1 Ham. 165.

Arson, in Con.t, is, substantially, the same as at C.L. except that by our Stat. the burning of any barn, house, or outhouse, is arson.

The punishment here, is diff.t under certain circumstances, from the same at C.L. (Stat. extends to ships & vessels. Is the meaning, that burning these, in Con.t, is arson? The punishm.t is the same; but the offence, I trust, would hardly be called arson.

"Burning," what? Neither a bare intent, nor an actual attempt, by applying fire, is a burning, if no part be burnt. But the actual burning of any part, is, tho' it be extinguished, or go out, itself. 4 Bl. 220. 2 Mass. 605. 1 Ham. 167. 1 Hal. 569-9-6: 3 Inst. 66.

Burning must be "malicious" — Seems only a trespass — burning thro' negligence, or accident, not arson. 1 Hawk. 107. 1 Hal. 569. Flor. 470. 4 Bl. 222. as, if one in shooting, accidentally fires a house. — Yet, if one intending maliciously to burn A's house, accidentally burns B's, it is arson: for the felonious intent. 1 Hawk. 107.

It is a C.L. felony, punishable with death; (burnt to death in the reign of Ed. I. 4 Bl. 221-2); & not clergyable. 4 Bl. 374. But it seems to me to have been entitled to clergy, by Stat. 25 Ed. III, but was ousted of it, first by 21 H. VIII. which being repealed by 1 Ed. VI, it was ousted again by 4 & 5 Ph. & M. 4 Bl. 222-3. 2 Hawk. 481. 503.

Lemed also to accessories before the fact, by 4 & 5 Ph. & M. 4 Bl. 222-3.

By our Stat. this offence, if committed by a person of the age of 16 or more, is punished with death, if prejudice, or hazard, has been to the life of any one. It extends to burning outhouses, ships & vessels. Suppose a person, under 16 commit the act? punishable for a misdemesnor?

By another stat. of ours, if any male, of the age of 16 or more, shall wilfully & feloniously burn, or attempt to burn, by setting on fire, any State house, Courthouse, town h., schoolh., church, outhouse, shop, store, ship, or vessel, — & no prejudice, or hazard &c — Newgate, at the discretion of the Court, not exceeding 7 years. =

= For the second offence, confinement in Newgate, for any limited period, or for life. But, according to the general rule, the second offence must be committed, after a conviction for the first. 1 Hawk. 188. 1 Hal. 324. 5 T. 683. Dy. 323. 2 Bulst. 349.

In the case of a female, confinement in the com. workhouse, or com. gaol, in the County in which she offended, for the same period, as males in Newgate. — Must she be 16?

Do the words in this stat, "attempt to burn by setting on fire", mean such burning as falls within the C.L. definition sub? ? It seems they do. If so, it may be argued that the burning punished by the first stat. must be total. 2nd Qu. Stat's made at diff.t times — burning has a determinate meaning — in law. — Does, then, the partial burning of a ship or vessel, come within the meaning of the first stat.? I conceive it does. — The same act is contemplated in case of a vessel, as in case of a house.

13. Burglary is the act of breaking & entering into the mansion house of another, in the night season, with intent to commit a felony. 4 Bl. 224. 3 Inst. 63. 1 Hawk. 139. 1 Bac. 335. 1 Hal. 549. 2 R. 350. The usual defin.

As to the place: It seems not absolutely necessary that the breaking should be of a mansion house: Walls of a town, or a church. 4 Bl. 224. 1 Hawk. 162. 1 Bac. 335.

The necessity of the subject being a mansion house, obtains in the case of a private building, only. 4 Bl. 225. 1 Hawk. 162-4. The definition ought to include churches, & walls of a town. 2 Mod. R. 500.

The insertion of the words mansion, seems indispensable, in the indictment, when the breaking is of a private house; Jesus, not, it seems. 1 Hawk. 162. 1 Bac. 335.

The term "mansion house", includes all out buildings, which are parcel &c. & within the curtilage & homestall (p. 51): Being protected, & privileged, by the capital house. 4 Bl. 225. 1 Hal. 558. 1 Hawk. 163. 3 Inst. 64. Kely. 27, 52. 82. 1 Bac. 335. Popph. 42. 52. Leach. 320. — The curtilage seems to be that portion of ground, which is inclosed with the house, by one com. fence, or connected with it, directly by a fence. Therefore, an outhouse 8 feet distant, ~~not connected by any fence~~ separated by an open passage, & not within, nor connected by, any fence, enclosing both, adjudged not within the curtilage. 1 Hawk. 113. n. Leach. 145. 1 Hal. 558.

Room, or lodging, in a private house, (if the owner does not lodge in it — or, if he enters by a diff^t outward door, is the mansion house of the lodger. Qu. Ecus, if the owner lodges in it, & enters by the same outward door. Here, there is only one mansion house — that of the owner. 4 Bl. 225. Hely 83-4. 1 Hal. 556. 1 Ham. 183-4. Cont. 1. 2 Hal. 532. 1 Ham. 183. Cont. Hely. 27. Leach. 90. 230. 278. 364.

An uninhabited house cannot be the subject of burglary.

If A has a shop of, within his curtilage, & lets it to B, (who never lodges in it,) to work in; burglary cannot be committed in it. It is not A's mansion house; being severed by the lease; nor B's; for he never lodges in it. 4 Bl. 225. 226. 1 Hal. 556. 1 Ham. 184. Hutt. 33. 1 Bac. 335. Qu. Ecus, if the hirer lodged in it, 1 Ham. 184. n; or, if it were not leased, by the owner.

A house in which one sometimes resides, tho' left for a short season, — animo revertendi; — is a mansion house, tho' no one is in it, at the time. 4 Bl. 225. 1 Hal. 556. Post. 77. 1 Ham. 182. Mo. 660. Hely. 45. 52. 5. 7. 4 Co. 40. Poph. 40.

Or a house, which one has hired to reside in, & brought part of his goods into, tho' not lodged in. Hely. 45. Post. 77. Ray. 276. 1 Ham. 182. The house of a corporation is within the definition; its officers living in it — mansion house of the corporation. 4 Bl. 225. Leach. 67. Post. 38-9. 1 Bac. 335. — Not committed in a tent, or booth — temporary — it is a tabernacle. 1 Bac. 335. 4 Bl. 226. 1 Ham. 184.

Burglary.

Under our stat. burglary may be not only as at C.L. but by breaking a shop, in which are goods, wares, & merchandise, tho' at a distance & not lodged in.

Decided, in Con^t, that the cabin of a vessel, containing goods, may be the subject of burglary. Root. 63. — Quære mirum!

It is essential that the name of the owner, or occupier, of the house be inserted in the indictment. Leach. 240.

"Night season". Formerly, it might be committed at any time between Sunset & Sunrise. 4 Bl. 224. 1 Rus. 334. But now, the term includes only the time between the evening, & morning, twilight. 4 Bac. 224. 1 Hal. 550. 3 Inst. 63. Cannot be committed, during twilight.

It is said, if there is so much daylight, or twilight, that one's countenance can be clearly discerned; not "night season", within the definition: But it must be daylight, or twilight; not moonlight. 4 Bl. 224. 17 Ham. 160. 7 Co. 6. a. b. 1 Rol. 524. 2 Ker. 600-1.

As to the manner — both breaking & entry necessary — need not be at same time: Breaking on one night & entering on another, sufficient. 4 Bl. 225. 1 Hal. 551. 1 ~~Hab~~ [Hely] 67-8. Leach. 342.

Breaking may be, not only by thrusting open a door, but by breaking or taking out, a pane of glass — picking a lock, opening it with a key — lifting a latch — or loosing any fastening. 2 McN. 501-2. 4 Bl. 225. 1 Ham. 160. 1 Hal. 508. 527, 551-2. — So, coming down chimney; for it is as much closed, as the nature of the thing will admit.

Breaking fixtures, in the house, as cupboards, chests, &c. not within the definition. Sent. Fost. 108-9. Kely. 31. 1 Hal. 527, 2 McN. 508.

Entering by an open door, not breaking, within the definition: Seems if having entered, he break an inner door of a room. 4 Bl. 225. 1 Hal. 553. 1 Hawk. 160. Kely. 67, 2 McN. 501-2. — This last is breaking the house — breaking chest &c. not.

Whether breaking out, (the party having entered, with intent &c. without breaking) or, being in, by the owner's permission, is a breaking within the definition at C. L., opinions contrary. 4 Bl. 227. 1 Hal. 554. By Stat. 12 Ann. declared to be so. 1 Bac. 333. 4 Bl. 227. 1 Ham. 167. Here, the entry is before the breaking. Ex. Taking lodgings, with intent &c. So, if being in the house (wt sup.) without a previous intent &c. he commits a felony, & breaks out: Seems, in both cases, if he goes, without breaking. 1 Ham. 160.

Entry procured by fraud (with intent &c. wt sup.) is burglarious. Ex. Being let in under pretence of business, & then stealing — or procuring an officer to enter under pretence of searching, for

traitors; & stealing, at sup. Here is of breaking, opening being occasioned by fraud &c – Law not to be thus evaded. 4 Bl. 225-7. 1 Hawk. 61. Hely. 42-4. 52. 63. 82. 1 Hal. 552. 3 Inst. 64. 1 Bac. 333.

If a servant open & enter his master's chamber door (with intent &c) or, a lodger, in a private house, or inn, opens & enters, another's door, (with intent &c) it is a burglarious breaking & entry – of the mansion house of the proprietor, or occupier. 4 Bl. 227. Hely. 67. 2 Nec. N. 601-3.

So, if a servant, in the house, conspire with a robber, & let him in, by night, that he may rob, both are guilty of burglary. 4 Bl. 227. Fost. 88. 1 Hal. 553. 1 Hawk. 102. 2 Nec. N. 604.

14. "Entry!" The least entry, with the whole, or part, of the body, or, thrusting in an instrument, or weapon; as a pistol, hook, &c – discharging a gun &c – constitutes burglarious entry. 4 Bl. 227. 1 Hal. 553-5. Fost. 108. 1 Hawk. 101-2. Hely. 57. 1 Bac. 334. 2 Nec. N. 603.

But it seems, that the instrument must be introduced, for the purpose of committing the felony with – as a hook, to draw out goods – a pistol, gun, &c to demand one's money &c – Decided, v. Bailey, 1785 – that boring a hole, thro' the door, so that there were chips on the inside, was not a complete entry – not being introduced to take property (1 Hawk. 102. n. Leach 342), or to kill, or intimidate, for the purpose of robbing.

Burglary.

On an indictment for breaking & stealing deft may be acquitted of the breaking, & found guilty of the stealing Leach. 891.

If several join, to commit a burglary some of whom stand at a distance, & watch, while others break &c - all guilty of the breaking &c. 1 Bac 334. 1 Hal. 50-1. 2 Ld. 553. 1 Hawk. 162. Foat. 350-3. Hely. 111. 2 McN. 604.

"With intent": To constitute burglary, there must be a felonious intent. Secus the breaking & use a mere tresp. 4 Bl. 227. 1 Hawk. 164. Ay. 99. Hely. 30. 67. 1 Hal. 552. Ex. Decided case: A servant, having run away, returned &c to take his own money. 1 Hawk. 164 - Secus if it had been to rob, murder, steal, &c 1 Bac. 336.

Sufficient if the intended act is a stat. felony, tho' not a C. L. Ex. Rape, which is not a C. L. felony. 1 Hawk. 164. 4 Bl. 228. Ar. 481:- For a stat. felony has all the properties of a felony at C. L. 1 Bac. 336.

Not necessary that the intent should be executed - intent alone sufficient: Of the intent, the jury are to judge. 4 Bl. 227-8. 1 Hawk. 159. 165. n. 1 Hal. 549. 2 St. 360. Foat. 107. 1 Bac. 336.

After one has been acquitted, on an indictment for breaking a house &c & stealing the money of A., he cannot be indicted for the same breaking, & stealing the money of B: But for the theft, he may be

(over)

Kely. 30. 52. 2 Hawk. 327. — For the breaking of is the same in both cases; alter of the stealing.

Punishment: Burglary is a felony at C.L., but clergyable: Now, punished with death, clergy being taken away, by Stat. 1 Edw. VI & 12.5 18 Eliz. — also taken away from accessories before the fact by Stat. 3 & 4. W. & M. 4 Bl. 228. 1 Hawk. 105. 2 Hal. 304. 1 Bac. 335. — this stat. extends not to accessories after the fact.

In Con.t for the first offence, newgate — if a male, not exceeding 3 years — for the second, not exceeding 5 years — for the third, during life — in common cases. — But if the burglar be guilty, in the perpetration, of personal abuse, force, or violence, — or be armed with any dangerous weapon, as clearly to indicate "violent intentions"; — newgate, during life, for the first offence, or a less period, at the discretion of the court — not, however, less than 7 years. "Dangerous weapon" — i.e. weapons of death, I suppose. "Violent intentions" — i.e. agt. any person — or any one, who shall oppose them, I suppose. Decided, in Cont., that burglary, being an offence at C.L. may be prosecuted as such; & that the stat. only declares the punishment. Root. 39.

Female. Confined in common work house, or common gaol, ut sup. i.e. for the first offence not exceeding 3 years, &c

Larceny.

Of Larceny, or theft, 2 kinds: 1. Simple. 2: Mixed. — Simple, is plain theft, unaccompanied with any aggravation. Mixed, or compounded, includes in it the aggravation of taking from one's house, or person. 4 Bl. 229. 1 Harr. 134.

I. Simple: Simple larceny is the felonious taking, & carrying away of the personal goods of another. 4 Bl. 229. — If the goods are above the value of 12 pence, the offence is grand larceny. If of that value only, or under it, it is petit larceny. Id. 1 Hal. 503-4. Post. 121. 2 Bac. 475. 1 Harr. 134. 145-6. — For Grose J. in delivering the opinion of the court, (Leach 1089) "Larceny is the felonious taking of the goods of another, without his consent & agt. his will, with intent to convert them to the use of the taker."

If goods above the value of 12 pence are stolen by several, each guilty of grand larceny. 1 Harr. 145. Stealing under the value of 12 pence, at several times, from the same person — not grand. 1 Harr. 145. n. Leach. 265 — Cont. 1 Hal. 531. 2 Hab. 719 — old.

The difference between grand, & petit, is the value of the goods: — Hence, the rules laid down with respect to the nature of simple larceny, in general, apply to both grand & petit. 4 Bl. 229. 1 Harr. 145. Post. 73. In punishment, they differ essentially. Id.

"Taking": Gen. rule, that every felony includes a tresp.: Hence, if the party is guilty of no trespass, in taking, he cannot, according

to the rule, be guilty of felony, in carrying away. 2 Mc. N. 588.
* 2 Bac. 472. Hely 2. 81. 1 Harr. 134. 4 Bl. 231. Qu. at this time? infra.

The goods must, therefore, be taken from the poss.n of the owner, actual, or constructive. 1 Harr. 352. n. a constructive poss.n is a right of present poss.n. 1 T. R. 480. 4 Ib. 489. 7 Ib. 9.

Hence if one finds goods, & converts them animo furandi; not larceny - no tresp.† C So, generally, one possessed under a deliv=ery of the owner, is not guilty of larceny, it is said, by afterwards embezzling. 2 Bac. 472 - 3. 4 Bl. 230. 1 Mat. 103. 1 Ham. 134 - 5. 1 Hal. 504. Ex. A carrier of goods, who converts &c - a tailor, of cloth &c

(† The taking is, per se, larceny)

Qu. as to the cases sup. of delivery to a tailor &c. For lately holden, as a general rule, that when the delivery is for a certain special purpose, - owner having a right to countermand the delivery, (Leach 142), the poss.n is in the owner; ergo, embezzling, animo furandi, is a felonious taking: Ex. A watchmaker, embez=zling, animo furandi, a watch, delivered to clean. (O. Bailey. 1798) clothes, delivered to be washed (O.B. 1758) guineas, delivered to be changed (O.B. 1778. &c) - In these cases, a previous intent to steal, seems not to be supposed: But the constructive poss.n being in the owner, taking &c with felonious intent, is a felonious taking from the owner. 1 Harr. 135 - 6. (The taking, in these cases, would not be tresp.) - So. of goods, delivered for safe custody. 1 Harr. 130. n. Hely. 1. - 2. Coop. 294 - 6. - Qu. ergo, as to the general rule supra * - Leach. 242. 349. Dy. 5. 2 Mc. N. 588.

15. If one obtains a delivery, with intent to steal, & carries away, or embezzles, it is larceny. So, by the ancient rule. Ex. Obtaining a bill of exchange, under pretence of discounting, but with intent to steal, & then converting it. 1 Carr. 135. n. 137. Leach. 266. 2/3. 231. 291. 355-6. 95. Hely. 81-2. Thor. 50, 57. 2 Bac. 473. 3 Inst. 108. 1 Hal. 53. 1 Sid. 254. 2 Mc N. 339 &c. — In fraudem legis, - of which he can take no advantage: Poss.n, in law, remains in the owner. (For the felonious intent, it is said, extinguishes the contract, or permission). Ergo, the owner retains poss.n, in law. Hely. 82. 1 Carr. 135. n. For the taker shows his original intent to have been, not to take on the contract but to steal. Ray. 275-6. Hely. 81-2. — (What need is there of considering the contract extinguished, where there is, otherwise, a right to countermand, - or constructive poss.n)

Secus, if the pretence were to buy, & the property was sold & delivered. Here, both the actual, & constructive, poss.n is parted with. Leach. 95. 358. 401. Vendor's right of poss.n transferred, by the terms of the contract: Qu. Inter, in the above cases of bailment.

So, obtaining goods from an officer (with intent to steal) under a replevin, - or by virtue of an execution, on a judgment obtained by fraud on the court &c, - is a felonious taking: For the replevin, & judgment are void. 2 Bac. 473. 3 Inst. 108. Hely. 82. Ray. 276. 1 Carr. 135-7.

Seems clear, even according to the older authorities, that if a carrier, having carried the goods to the place, takes them animo furandi, the taking is felonious, tho' no felonious intent, originally; for the bailment is

determines; ergo he is a stranger. 1 Ham. 136. 3 Inst. 107. 1 Hal. 505. 2 Bac. 473. Hely. 83. 4 Bl. 230.

So, if he takes them to a different place, from that of their destination, & then embezzles, animo furandi. Hely. 81-2. 1 Hal. 504-5. 8 Mass. 518. – So, in the case of hiring. Leach. 358. Same reason – i.e. by the breach of trust, his poss.n becomes wrongful.

So, if a carrier opens a bale of goods, & takes away part; – or pierces a cask, &c. it is felonious taking. 1 Hal. 504. East. P.C. 695. 4 Mass. 580. 1 Pick. 375. (Because, as some say, he had no property in the goods (Qu.); tho' he had in the thing containing. 2 Bac. 473. – Bl. says, because the animus furandi is manifest. 4 Bl. 230. – Ham. says, because the poss.n of part, distinct from the whole, is gained by wrong. 1 Ham. 135. 2 McN. 587.) The true reason seems to be, that the poss.n is, in law, all the time, in the bailor, or owner. Hely. 83. Leach. 242. There is, always, a right to countermand.

If one sells a horse to another, & the latter, on delivery, immediately rides away with him, with vendor's consent; no larceny, – whatever the original intent might be: – absolute poss.n in vendee. Leach. 401. 2 McN. 592. Vendor has parted with his right of poss.n. – It is only a fraud. 7. 64.

Said, that if A. lets B. a horse, & B. with intent to convert it, rides away with him; not larceny. (Because both the poss.n & the right of

Posp.: for the term of the bailment, are parted with, by bailor. During that term, he has no right to countermand the delivery.- P. R. g. 2 McNr. 592. Leach 213. 358. 401.) 4 Bl. 230. 1 Hal. 504. Here, the original hiring must be bona fide, & the intent to steal, subsequent. Leach. 358. - Secus, it is larceny. p. 65. Leach 213. 358.

Suppose, that, after the time, for which the hiring was, has expired, the hirer converts, animo furandi. Leach. 358, & Qu.

1. Where, according to the terms of the bailment, bailor has no right to countermand, at the time of conversion, the conversion cannot be larceny; unless the delivery was obtained with intent to steal. Ex. Horse hired, bona fide, for a month, converted, animo, in a week. Leach. 358.:: 2. Secus, if bailor, according to the terms of, had a right to countermand:- Constructive posp.: in last case, not in the first. 3. If bailment was obtained with intent to steal, it is always larceny.

The bare non-delivery of goods, by bailee to bailor, when the former is bound to redeliver, is not, of course, evidence of a felonious intent, even in those cases, in which converting, animo furandi, is larceny: for it may happen from various other causes. 4 Bl. 230.

Larceny.

At C.L. (according to the ancient rule) if a servant runs away with goods, committed to his custody, - not a felonious taking - mere civil wrong - breach of trust. Now, by Stat. 21. H. VIII, it is larceny if the goods are of the value of 40/. - except in apprentices, & servants, under 18. 4 Bl. 230-1. 1 Hal. 504. 2 Bac. 474. 1 Harr. 69. 138.

Qu. Why does not the case come within that of the ratstomaker (p. 63) Idem Qu. as to the rule at C.L. Has not the law undergone a change, in modern times?

But at C.L. & according to the older opinions, if the Servant had not the poss.n, but merely the care & oversight of, running away with, or embezzling, is a felonious taking. 4 Bl. 231. 1 Hal. 505-6. 1 Harr. 136. Mo. 216. Popl. 84. Ec. A Shepherd, a butler: poss.n in master. Hely. 35.

If goods stolen, are stolen from the thief, the 2nd taker is guilty of a felonious taking from the owner - for the prop.y, & poss.n in law, are in him. 1 Harr. 136-7. 2 Bac. 473. 2 Mod. 589.

If one steals goods in the county of A. & carries them into the county of B. he is guilty of a felonious taking, both in A. & B. & may be prosecuted in either county. For every moment's continuance of the offence of taking, is a repetition of it. 1 Harr. 136-7. Root. 69. 2 Bac. 473. Secus, if the original taking be in a foreign state. 1 Harr. 137. 2 Johns. 471-9. - Rules Contra, in Con.t & Mass. 1 Mass. 115. 2 Con.t R. 165.

Larceny.

It is not larceny to receive goods, clandestinely from the wife of the owner. Leach. 49. – Because her taking is not felonious – She cannot be guilty, as principal: Ergo, no accessory.

"Carrying away." The least removal from the place is a carrying away (tho' he afterwards leave them, or is detected). Ex. Leading a horse out of the close, he is apprehended. So, carrying goods down stairs only – so, taking out of a trunk, & laying them on the floor. 4 Bl. 23. 2 East. 108. 9. 1 Ham. 140. 2 Rent. 215. 1 Hal. 508. Kely. 31. 2 Bac. 474. East. 108. 2 C. & K. 592, &c.

Raising a bale of goods, on its end, not a carrying away – not removed from the spot. But removing from one end to the other, of a waggon, sufficient. 1 Ham. 141. n. Leach. 229. – Case of diamond ear-ring. Ib. Leach. 297.

"Felonious." The taking & carrying away must be felonious – i.e. animo furandi. (Hence those wanting understanding are excused – so, are mere trespassers.) – Ex. A servant privately takes his master's horse to ride, & returns him; so, taking one's plough & without leave, & using it, & returning it. 4 Bl. 232. 1 Hal. 509. Intent to be discovered by jury. 4 Bl. 232. East. P.C. 685. 1 Hal. 504. – Usual evidence of such intent, is studious secrecy & concealment – with a purpose to convert, & to defraud the owner.

Whenever one takes personal goods, from the poss.n of another ag.t his will, the law presumes a felonious intent, till the contrary appears. p. 62. Leach. 203.

Larceny.

Personal goods & things real, or savouring of the realty, are not the subjects of larceny. Land cannot, in its nature, be taken &c.

And corn, grass, apples, &c growing, or before severance, are not within the law, as they adhere to the freehold (4 Bl. 232. Leach. 208. 2 Bac. 470. 1 Vent. 187. 1 Ham. 141. 1 Mod. 89. 1 Hal. 509-12.) i.e. if they are severed & carried away by one continued act; for then, they never were, as moveables, in the poss.n of the owner, actual, or constructive. Made larceny in many cases by Stat. 2 Geo: II. 4 Bl. 233. 2 Bac. 470. 1 Ham. 142.

Trees, if severed, at one time, & taken away, at another, whether severed by the thief, or the owner, or any person. There, when taken, they are personal, & in the owners poss.n 4 Bl. 233. 3 Inst. 109. 1 Hal. 510. 1 Ham. 141. 2 Bac. 470. 1 Vent. 187.

Taking wool from a living sheep, or milk from a cow, animo &c, is larceny. Leach. 181. 2 McN. 393.

Reason for the distinction between personal chattels, & things fixed to the freehold, may be: That, as the latter are not so easily taken, & removed, not so liable to be stolen — ergo, so severe laws not necessary as to them. 1 Ham. 142. See 4 Bl. 232-3. 2 Bac. 469-70. — Different reason:— Generally, not so valuable.

Taking charters of land, cannot be larceny, it is said, because they relate to the realty, are muniments of the freehold, & descend to

the Lev. 2 Bac. 470. 3 Inst. 109. 1 Hal. 506. 570. 4 Bl. 234. Str. 1137. Leach. 13. Yet trover will lie for them.

The goods must be of some value, in themselves, & some one must have some property in them. Hence, the taking of choses in action cannot, at C. L., be larceny – of no value, intrinsically, but merely by relation to something else, viz. the right, of which they are the evidence – & this right is not property in poss.n 4 Bl. 234. 8 Co. 33. a. 1 Hawk. 142. 2 Bac. 470. (1 Hal. 506. cont. 2 Bac. 470 – because they might not answer the purpose of money, at the camp) – made larceny by Stat. 2 Geo. II. 2 Bac. 470. 1 Hawk. 142. ∴ No such stat. here.

Taking animals, ferae naturae, & not tamed, or confined, cannot be larceny at C. L. tho' of intrinsic value. Ex. deer in a forest – fish in an open river – wild fowl, in their natural state. cf. 4 Bl. 235. Foxc. 366. 1 Hal. 511. 2 Bac. 471. 1 Hawk. 143–4.

Secus, if reclaimed, or confined, & may serve for food. Ex. deer in a park – fish in a trunk cf. 4 Bl. 235–6. 1 Hal. 511. 2 Bl. 393.

But such animals, ferae naturae, as will not serve for food, are generally, deemed of no value, in the law, on this subject: Ergo, tho' reclaimed, or confined, taking them cannot be larceny, at C. L. Ex. Foxes, monkeys, bears, cf. 1 Hawk. 143. 2 Bac. 471. 3 Inst. 109. 1 Hal. 506. 512. 2 Bl. 393. 4 Id. 235. – Yet even in these cases, a civil action will lie for the taking 4 Bl. 235.

Larceny.

Yet the taking of a hawk, tamed, may be larceny, it is said, at C.L. as well as by Stat. 37 Edw. III. 2 Bac. 474. 1 Ham. 143. 3 Inst. 109. - Qu. at C.L. 4 Bl. 236.

But domestic animals may be valuable, tho' not serving for food; as horses, mules, &c; & therefore, are subjects of larceny. So, those which do serve for food - as neat cattle - poultry, swine, &c. 4 Bl. 236.

Some domestic animals not deemed valuable, in the law on this subject. Ex. Dogs, cats; Ergo, taking, not larceny, at C.L., tho' it may be a civil tresp. 4 Bl. 235. 2 H. 293. 2 Bac. 474. 1 Ham. 143. 93

Under a certain Engl. Stat., excluding clergy in certain cases of "goods, wares & merchandize" stolen, money is holden not to fall within the description. East. Leach. 48. 56. 234. 403.

"Of another": Goods, of which no one is the owner, at the time of taking, not subjects of larceny. Ex. Treasure trove, waifs, &c before they are seized by the persons having the right. 1 Ham. 144. 1 Hal. 512. 1 Bl. 295-7. - Here, at the time, the property is in dubio, or rather in no one. It may become the Kings, or, in certain events, be revested in the former owner.

But,

But, tho' there must be a property in some one, at the time, yet, said, that the owner need not be known, & that indictment lies for stealing the goods of a person unknown - i.e. the indictment is sufficient. 4 Bl. 233. 1 Carr. 144. Ly. 99. 1 Hal. 512.

But, in such case, it is said (2 Hal. 290. 8 Mod. 249) that, at the trial, unless the property is proved to be in a stranger, it shall be presumed in the prisoner. 2 Hal. 290. 2 McN. 580. 1 Carr. 145. n. 352.

Stealing the goods of a parish church is larceny; the goods of the parishioners. 1 Carr. 145. So, stealing a shroud from a dead body; it is the property of him, who was the owner, when it was put on. 1 Carr. 145. 3 Inst. 110. 12 Co. 113. - Stealing or taking up a dead body, not larceny, but an indictable offence - a high misdemeanor. 2 T.R. 733. Punishable, in some of these states, by stat. law.

A person may commit larceny, by taking his own goods, in certain cases. Ex. One delivers goods to a carrier, tailor, or other bailee, & afterwards secretly & fraudulently takes them away, with intent to make the bailee answerable. 1 Carr. 145. 3 Inst. 110. Cro. E. 530. So, if he sot his own messenger, with intent to charge the hundred. 4 Bl. 231.

If A's goods are bailed to B. it seems, that one stealing them, may be indicted, generally, as for taking B's goods. 1 Carr. 145. Kely. 39. O.B. 1785.

Larceny.

On an indictment for larceny, if a felonious taking is not found, the court cannot, on a special finding, give judgmt agt. deft, for a tresp. Hely. 29. Leach. 17. The two offences are generically different.

Punishment: Simple larceny, whether grand, or petit, is a C. L. felony. 3 Bac. 475. 1 Hal. 69. 1 Ham. 145. 4 Bl. 95-7. 2 Wils. 19. 1 McN. 208.

Grand is a capital felony at C. L. but within the benefit of clergy; which, however, in many cases, is taken away by Stats; as in horse stealing 4 Bl. 237-8. 1 Hal. 12. 3 Inst. 53. 2 Ham. 49. — money.

Petit larceny, punished, at C. L, with forfeiture of goods & chattels, & whipping, or other corporal punishment (1 Ham. 145. 3 Inst 218. 1 Hal. 70. 530. 4 Bl. 237. 95-7. 2 Bac. 476.) — not forfeiture of lands, not being a capital felony — & of course, no attainder.

17. In Con.t no distinction between grand, & petit, larceny: Fine, not exceeding $3 & if the value of the goods amounts to $3.34. (whipped, not exceeding 10 stripes — if of the value of 84 cents, or more, & under $3.34. no whipping. — Treble damages to the owner.

In many of the states, states prison, or penitentiary.

Larceny.

III. Mixed Larceny: This has all the properties of simple; ergo, the rules laid down as to simple, will apply to this: It always, therefore, involves the felonious taking & carrying away of another's personal goods. But it is also accompanied with the aggravation of taking from one's house, or person, or both. 4 Bl. 239. 1 Harr. 137.

1. Larceny from the house: This, tho' more aggravated, than simple, is not distinguished from it, at C.L. either in its general nature, or kind of punishment. 1 Harr. 137. 4 Bl. 239-40.

If, indeed, it is accompanied with a breaking of the house, in the night season, it differs most essentially; but it then falls under a different description. 4 Bl. 240. — It is then burglary. p. 55.

But by Stats. in Eng. the penal consequences, of mixed larceny, differ from those of simple, in general; Benefit of clergy being taken away from the former, in almost all cases. 4 Bl. 240. 1 Harr. 137. 1 Hal. 506. 1 Kely. 31. Post. 78. Leach. 310.

In Con^t. not distinguished, at all, from simple larceny.

2. Larceny from the person. This is either by stealing privately, or by open, & violent, assault: the latter offence is called robbery. 4 Bl. 241. 1 Harr. 147.

Larceny.

The offence of privately stealing from the person (as by pocket picking) is a felony at C.L., & if of above the value of 12 pence, capital - but clergiable at C.L. Clergy is taken away, however, by stat. 8 Eliz. 4 Bl. 241. 1 Ham. 150. 1 Hal. 521. Leach. 233. 2 McN. 399, &c

If of the value of 12 pence only, or under, not capital, at C.L. 4 Bl. 241 Post. 73. 2 Hal. 366. 1 Ham. 151.

Difference, then, in punishment, between simple larceny, & privately stealing from the person, is, that in the latter case, clergy is taken away, if above the value of 12 pence. Alter, in the former.

Robbery

Open, & violent larceny from the person, or robbery, is the felonious & forcible taking, from the person of another, of goods, or money, of any value, by violence, or putting in fear. 4 Bl. 242. 1 Ham. 147-8 - value immaterial.

"Taking from the person" of - There must be an actual taking - an attempt to rob, not felony at C.L. Lid 1 Hal. 532. 3 Inst. 69. (tho' formerly holden to be so, 4 Bl. 242) - It is a high misdemesnor incurring fine & imprisonment. 1 Ham. 148. 4 Bl. 242. = But,

Such attempt made felony by stat. 7 Geo. II. – transportation for 7 years 1 Ham. 148. 2 M. 242. Leach. 22. 251.

If one takes the goods of another, in his presence, by violence & putting in fear (tho' not literally from his person), it is within the definition. Ex. First putting in fear, & then taking away one's horse, standing by him – or driving away his cattle, which are in his presence. 1 Ham. 148. 1 Hal. 533. Hal. 673. Hor. 1015. Carth. 145. 4 M. 242. 2 McN. 594–5.

So, if having put me in fear, he takes goods from my servant, in my presence, it is a forcible taking from my person. 1 Ham. 148.

He, who receives my money, &c. by my delivery, while I am under terror from his assault, is guilty of a forcible taking from my person. So, if by putting in fear, he extorts an oath from me that I will deliver it, & I do it, in pursuance of the oath. 1 Ham. 147. 3 Inst. 68. 2 McN. 594.

But a taking, which is not either directly from the owner, or in his presence, is not within the definition – no robbery. 4 M. 244. Com. P. 478. Hor. 1015.

If several join to rob A. & missing him, one of them goes from the rest & without their knowledge, & out of their sight robs B. & then returns to them; all are guilty – because of the intent to rob, & to assist each other. 1 Hawk 148. 1 Hal. 533-4-7. 2 M & R. 596. – Qu. unless they collected for the purpose of robbing any person who might fall in their way?

Redelivery, after the taking is complete, does not purge the offence of taking – it is still robbery. 4 Bl. 242. 1 Haw. 147. 3 Inst. 68-9. – for the definition does not require the continuance of the goods in the robber's poss.n Leach 224. 1 Hal. 533. 2 M & R 594-5.

"By violence or putting in fear". The criterion, which distinguishes robbery from all other larcenies: – Without it, there can be no robbery. 4 Bl. 242. 1 Haw. 148. n. 2 Ib. 494. 3 Inst. 68. Hely 69-70.

"Violence" in this case denotes more than is implied in the mere act of taking, which itself is violence, in judgment of law. Ex. There is violence in pocket picking: But robbery requires more. It denotes violence of some kind, offered to the person, but it ought to be such, as is calculated to excite fear. Lemb. 1 Haw. 149 n. 4 Bl. 243. Foost. 128-9.

But actual violence to the person, is not necessary – putting in fear sufficient. Ex. Case of oath extorted C. J. 76. Sid. & Leach. 283-4. 257.

Robbery.

The violence, or putting in fear, must be previous, at least must not be subsequent. Ex. If one steals privately from the person, & afterwards keeps it by putting in fear, it is no robbery. 1 Ham. 148. n. 2 Rol. R. 154. 1 Hal. 534-5. — "taking of, by violence" of. —

The violence of must be professedly for the purpose of obtaining the money of taken. For where several, finding one drunk, & under pretence of carrying him home, dragged him, kicked him of, & privately took his money — no robbery. 2 McN. 597. 1 Ham. 148. n. O.B. 1784. p. 797.

Handcuffing a prisoner to extort money from him, & then actually extorting, is robbery. Leach. 265. 2 McN. 597.

As to putting in fear, sufficient that so much force, or threatening by word, or gesture, is used, as might naturally create an apprehension of danger to the person. 4 B. 243. 1 Ham. 149. n. Post 128. Leach. 204.

8. So, such threatening, as is likely, according to common experience, to excite an apprehension of danger to one's character or good name, sufficient putting in fear. 1 Ham. 149. n. Ex. Threatening to accuse one of an unnatural crime. Id. 4 B. 178 - p. 296. 1780. p. 542. 2 McN. 598-9. - By all the judges of Eng. so holden. Post. 129. Leach. 199. 207. — Fear of personal violence not necessary.

Robbery.

Begging, with a drawn sword of sufficient for putting in fear — So, forcibly extorting money from another, under pretence of a sale. 4 Bl. 243. 1 Hawk. 149. 1 Hal. 533 - 4. Leach. 204. 2 Mc N. 597.

Whether compelling a market woman, or any higgler, by violence of to sell her goods, for the full value, is robbery, dub. fent. not — no felonious intent. 1 Hawk. 149. 4 Bl. 243.

See Farr's case Kely. 43. That taking goods under legal process, without color of right, & with intent to rob, is robbery — in fraudem legis. Fed. Lu. where is the fear? or sufficient cause of fear? Larceny it may be.

"Putting in fear", not necessary in the indictment. "By violence", sufficient. 4 Bl. 243. 1 Hawk. 149. n. Kely. 70. Leach. 204.

When the offence is laid to have been committed, "by putting in fear" not necessary to prove actual fear — Such circumstances of violence or such threats, as are calculated, & likely, to excite it, sufficient. Ex. One knocks another down, without warning, & strips him, while senseless. — Robbery, tho' no actual fear. 4 Bl. 243. 1 Hal. 532. 1 Hawk. 149. Fost. 128. Leach. 264 - 5. 203. 2 Mc N. 598.

A claim of property, in the goods taken, without any colour of right is no excuse. 1 Hawk. 149. 1 Hale. 529.

Robbery.

Whether openly taking goods from the person, without violence, or putting in fear, is felony of any kind, dub. According to Ham. it is not. 1 Ham. 150. 2 Ed. vid. St. n. & 149. n. - Ex. Snatching a hat from one's head, & running away with it. Ray. 275-6. Sy. 224. It does not, strictly fall under either of the divisions of larceny from the person. 2 Rol. 154. Hely. 43. 70. 1 Did. 254. Leach 264.

Indictment for robbery on a highway, not supported by evidence of a robbery in a dwelling house. Leach. 53. 2 Ham. 495. 2 Ch. R. 599. "Highway," in this case, is part of the description of the offence.

Punishment: A capital felony (whatever the value of the goods) but clergyable at C. L. Now, ousted of clergy by Stat. 23. H. VIII + 3 & 4. W. & M., ergo, death in Eng.? - both in principals, & accessories before the fact. 1 Ham. 149-50. L. 2 Bl. 243.

In Cont., like burglary: Newgate for first offence, not exceeding 3 years H. - if a male - female in Com. gaol or workhouse - Sy. 301. with "personal abuse, force, or violence" - or, so armed &c. newgate for life, for first offence. - What kind of robbery is meant in the first case

C. Forgery.

Forgery, or the Crimen falsi, at C.L. is the fraudulent making or altering of a writing, to the prejudice of another's right. 4 Bl. 247. 1 Hawk. 335-210-12. 2 Bac. 566

Records, - other authentic writings of a public nature, as parish registers, & deeds, & it seems, wills, are subjects of forgery at C.L. 1 Hawk. 335-8. 2 Bac. 568. 1 Rol. 80-5-8. 76. 3 Mod. 86. Str. 69. 1 Ray. 81. No. 760. - No decision at C.L. as to a will. 1 Hawk. 338. - but it is now a subject of forgery at any rate by Stat 2 Geo: II. 1 Hawk. 210.

But according to a great number of opinions, the making, or altering of any private writings, of a nature inferior to deeds & wills, is not forgery at C.L. Ex. Notes, orders, bills of exchange & not specialties. 1 Hawk. 335-8. 2 Bac. 568. 1 Rol. 68. 1 Sid. 16. 155. 451. Cro. E. 853. 3 Bulst. 265. (And, according to some, there is no punishment in these cases. 1 Hawk. 338. not even for a cheat.)

But it has been holden, since Hawkins' time, that the fraudulent making of of any writing, by which another may be prejudiced is forgery, at C.L. K.B. R. 737. 1461. Str. 747. Barnard. 10. Fraudulent making of of a bill of exchange, or unstamped paper, is forgery. 2 T.R. 608. East. 246. 2 McN. 480-5. Str. 910.

By a variety of Eng. Stats, however, almost every species of writing is made the subject of forgery. 2 Bl. 247 & 1 Hawk. 330. Our stat. includes all private writings, by the words "any other writing"

Forgery.

If one makes a false will, in the name of another, the forgery is complete, tho' the supposed testator is living. Leach. 103 391. 2 Ec. N. 483.

Not only actually making a false instrument, & subscribing another's name to it – & fraudulently altering one already made, is forgery; but many other acts are so. 1 Ham. 335. Ex. One employed to write a will for a sick man, falsely & inserts legacies, not directed to be inserted: Here, the name is not forged, nor is the writing altered – after being executed. Ib. & 2 Bac. 567. No. 759. Ny. 101. 3 Inst. 170. Sy. 288. cor. – Suppose the will never executed:– Not, forgery, I conceive; because there would be no complete instrument. 2 Bac. 567. No. 760. 1 Ham. 337.

So, writing an obligation, release, &c. over one's name, found. 2 Bac. 567. Here, the name is not forged, but the instrument is. So, making a mark, in the name of another, may be forgery. Leach. 61. This being a mode of signing, by such as cannot write.

So, if one fraudulently inserts in an indictment, the name of one, agt. whom it was not found. This is an alteration of. 1 Ham. 335. 3 Mod. 55. 8 Ib. 192. 12 Ib. 492-6. 2 Bac. 567.

Fraudulently altering a deed, in a material part, is forgery. 11 Co. 27 a. 1 Ham. 338. 2 Bac. 567. No. 619. Ex. Manor of B. for manor of A. £1000 for £100. (3 Inst. 169. Cont. because not made in the name of

another than the true signer - & neither hand nor seal counterfeited.) But it is directly within the definition - Secus, if the part is immaterial. sed vide p. 85.

If one having found a bill of exchange, forges an indorsement, to get it discounted - it is forgery. 1 Hawk. 210. n. 3 at C. L. Rol. Ray. 146.

One may be guilty of forgery by making a deed himself, in his own name: Ex. One having given a deed of Blackacre to A. afterwards grants the same to B. & antedates the deed. This is fraudulent, & to the prejudice of A. 1 Hawk. 235. Mo. 655. 759. Roy. 101. 2 Bac. 566. Sy. 288. cor.

But he, who honestly writes an instrument in another's name, & signs, & seals, it, for the latter (in his presence, &) by his direction, is not guilty of forgery. It is the act of the latter, in law. 1 Hawk. 237.

But the making of, must be fraudulent - Ergo, if obligee changes the word "pounds" into "pence", not, in general, forgery - injury to himself only - (misdemesnor). 1 Hawk. 237. Roy. 99. Mo. 655. Cal. 375. 2 Bac. 567. 2 McN. 637. 1 Root. 94. But the security is avoided by it. 1 Hawk. 237. Esp. 224. 11 Co. 25. 1 Root. 94.

19 Yet it is said, that even this alteration, if made with a view to gain an advantage to himself, or to prejudice a third person, would

be forgery. 1 Harr. 337. 2 Bac. 807. Ex. Obligee bound to assign the obligation to a bona fide creditor of his own — makes the alteration to defraud the creditor, by rendering the deed void.

Regularly, a non-feasance cannot amount to forgery, tho' the intent be fraudulent. Ex. Omitting a legacy in a will &c. — forgery being positive. But it is said, that if the omission of one bequest, materially alters the limitation of another, it may be forgery. Ex. Omitting an estate for life to one, whereby the devise of an intended remainder to another, is made to take effect, in presenti; — for here the omission operates in favour of the latter, as a positive devise for the life of the former. 1 Harr. 337. Mo. 760. Noy. 101.

Not necessary that one should be actually prejudiced: sufficient, that from the nature of the act, some one's right might be prejudiced. Ld R. 797. 461-5. Str. 747. Barnard. 10: as, where the obligation is never enforced.

Sufficient to aver a general intent to defraud — without pointing out the particular mode. Ex. With intent to defraud A.B. — sufficient. East. 75.

Not necessary to forgery that the writing should be published. Ld R. 461-9. Str. 747. — Punishable, tho' the party keeps it in his desk, the intent being clear.

Forgery.

Forging the name of a fictitious person may be felony. Leach 83. 1 B. 2 D.

Suppose an alteration in a part immaterial. If by obligee, regularly injurious to himself only – if by stranger, or obligor, of no effect. 11 C. 27. a. Yet if by obligee, it might in some cases prejudice another Ex. Another might have the beneficial interest.

Generally, the least variance, between the writing recited, & that offered in evidence, is fatal. Leach 389. – Yet, if a mistake in spelling does not alter the word to another not fatal. Ex. Ex. Understood, for understood: But it is fatal, if it make the words insensible. Comp.

In a prosecution for forging a writing, "purporting" to be such an instrument – deft. cannot be convicted – if it does not, on its face, purport to be the instrument described. Doug 287. 302. 1 East. 180. n. Leach 209. (as to the effect of the words "of tenor following," "as follows, that is to say," of 2 Hawk. 146. 198. Comp. 229. 2 Ld. Ra. 1575. Str. 231. 787. Cal. 660. 3 Burrow S. 100. Doug. 93. 183.

In the indictment, the forged instrument must be set out in words & figures. 1 East. 180. n. Doug. 287. 302. Leach 209.

Punishment: at C. L. by fine, imprisonment & pillory. By a variety Post. 6. of Eng. Stat. more severely punished – in most cases with death. 4 Bl. 247-50.

In Con. Newgate, if a male, for the first offence, not exceeding 3 years of: & to pay double damages to the party injured - & to be incapable of giving verdict or evidence, in any court.

Whether the person, in whose name the forged instrument is, may testify agt the prisoner, see Peak. Ev. 95. 116. 1 Mass. 37. 60. 105. 117. 135-9. 141-4.

Under our Stat. the making of of any writing is not forgery, unless it be "to prevent equity & justice." This does not seem to vary the offence, in substance from what it is under the C.S. defintion.

The word "alter," not used in our stat; but "altering a writing" is "making a false writing". - The form here, is to charge with making a false deed of, when the act was altering.

Uttering & Publishing, as true, a forged instrument, to prevent equity &c, is punished, under our Stat, as forgery is.

Perjury.

Perjury is the crime of swearing wilfully, absolutely, & falsely, in a matter material to the issue, or point or question — under a lawful oath administered in some judicial proceeding 4 Bl. 137. 3 Inst. 164. 1 Hawk. 318. 3 Bac. 814.

It must be a wilful false swearing — i.e. with some degree of deliberation — & this ought to appear clearly: — not perjury, if thro' surprise, mistake, or inadvertency 1 Hawk. 319. 3 Bac. 814. 5 Mod. 350. 10 Ib. 195. Sal. 513. 3 Inst. 163. 4 Bl. 137. 2 Mc N. 635.

The oath must be taken in some "judicial proceeding" — i.e. in some court, or before some officer, having authority to administer an oath; & in some proceeding, relative to a civil suit, or crim.l prosecution. 1 Hawk. 319. 4 Bl. 137. Cro. E. 188-9. Noy. 128. 2 Rol. 257-8. Hob. 62. 3 Bac. 814.

Immaterial whether the court is of record, or not. 2 Mc N. 470. Burr. 1189. Leach. 523. Ex. Ch.g — Eccles.l — ct in Eng. — or any other lawful court. 1 Hawk. 319. Cro. E. 185, 609. 907. 5 Mod. 348. 1 Rol. 41. 2 Ib. 257. 12 Co. 101. Cro. E. 12. 3 Bac. 814.

Any voluntary, or extrajudicial, oath, not within the law. 4 Bl. 137. 1 Hawk. 320-1. Ex. An oath before a magistrate, on making a bargain, that the property is the vendor's &c. Vent. 3[illegible]-70. Cro. 2 Rol. 257. Yelv. 72. 3 Inst. 166.

But Perjury may be assigned on an affidavit, or deposition, tho' the affidavit &c. is never, in any way, used. 7 T.R. 315. The offence is complete, by taking the oath.

Perjury is confined to such public oaths, as affirm, or deny, some matter of fact — not predicable of promissory oaths — as oaths of office. 1 Ham. 320-1. 2 Rol. 267. 3 Inst. 166. 3 Bac. 814. (But the violation of the latter may be a misdemeanor.) 1 Ham. 321. 4 Com. 147. Ex. Oath of a juror, or judge, or of an executive, or ministerial, officer.

But Perjury is predicable of any false oath, material to the point in question, in judicial proceedings, tho' not affecting the principal judgment. Ex. Respecting the ability of one offered as bail &c. &c. upon any interlocutory question. 1 Ham. 320. Cro. C. 146.

A party, when allowed his own oath, in judicial proceedings, may commit perjury, as well as an indifferent witness: Ex. Deft in his answer in Chan.y Bull. 239. 2 Mc. N. 470. — Parties' affidavits, on collateral points, in Courts of law — book debt, in Cont — &c. 1 Ham. 322. 1 Rol. 40. 3 Bac. 815. 4 Com. 146-7.

If deft in Chan.y, having given a false statement, explains it (upon exceptions taken), in his second answer, consistently with the truth of facts; he is not guilty — mistake presumed. 1 Sid. 418. 2 Keb. 576. 2 Mc N. 474.

2. But a juror, who violates his oath, in his finding, is not guilty of perjury – for he is not sworn to testify the truth – but his oath is promissory. p. 88.

Said not, necessarily, to be material, whether the matter sworn to be true, or not, in fact, – if the witness swears that he knows, what he does not know, to be true, he is perjured. For he is to swear to those facts only, which are within his knowledge. 1 Ham. 322. 3 Salm. 294. 2 Rol. 77. 3 Inst. 166. 3 Mod. 222. 6 P. R. 637. 4 Com. 147. – Suppose he swears, absolutely, to what is not true, but believing it true: Guilty of perjury? – I think not.

The swearing must, it is said, be absolute, & direct, – Swearing under such qualifications as, "I think", or "I believe", or "according to my recollection", cannot, it is said, be perjury. 1 Ham. 322-3. 3 Inst. 166. 3 Bac. 815. 4 Com. 147. Qu. If the witness does not think so? (Comp. 229); for it has the weight of common testimony – May not the law be thus evaded? – It is perjury. Leach. 301. 2 Bl. R. 885. 1 McN. 262-3.

The swearing must be to a "material point". Impertinent, & idle, testimony cannot be perjury. 1 Ham. 323-4. 3 Bac. 815. 1 Sid. 274. 4 Com. 147. Hob. 53. Sal. 14. Cro. E. 500. 1 Rol. 78. 141. L. R. 258-9. 5 Mod. 345-8. – Ex. in daily experience – The question was, whether A. was compos, or not; the witness gives a history of a journey to see A. & misrepresents some of the incidents of the journey.

But if the false evidence, tho' circumstantial & not directly applying to the issue, tends to aggravate, or extenuate damages, it may be perjury. 1 Ham. 323-5. Bro. P.C. 2. 12 Co. 101. 2 Leon. 198. 3 Bac. 815. – It goes to one point in question," & is material to that point – viz. the point of damd.

So, it is said, if the immaterial & false part of the evidence is likely to induce the jury to give a more ready credit to the substantial part. 1 Ham. 323-4. L.d Ray. 258-9. Palm. 382. 2 Rol. R. 368. – This point, not well settled. 1 Ham. 324. Ex. Falsely swearing to certain artificial, or natural, marks, about stolen prop.y – falsely professing good will to the party, agt whom he swears.

Swearing that one beat another with a sword, when, in truth, it was with a staff, – not sufficiently material, to constitute perjury (1 Ham. 323. 4 Com. 147) the beating only, material. – Qu. may not the kind of instrument tend to aggravate of.e sup.a

Need not appear, in what degree, the false evidence was material; sufficient, if it be circumstantially so – much less, necessary, that the evidence be decisive of the issue. (1 Ham. 325-n. L.d R. 287. 883.) for it may be very material, & yet not sufficient to govern the finding.

Always incumbent on the prosecutor to prove the evidence material! 1 Ham. 325-n. Cites O.B. 1784. p. 305.

Perjury.

The postea of a former issue is good evidence, that a trial was had, so as to introduce evidence of what was sworn. 2 McN. 456. 535.

And the cause, in which perjury was committed, must be set forth. 1 McN. 283. Ray. 170. – How far office copies of an affidavit of, on which the perjury is assigned, are evidence, see 2 McN. 456. of

Not necessary that the false evidence should have been credited by the jurors – nor, of course, that any person should have been actually injured. The crime does not consist in a damage done to an individual but in abusing public justice. 1 Ham. 326. 2 Leon. 211. 3 Ib. 233. 3 Bac. 815.

The word "wilful", is not necessary in the indictment, at C. L. Leach. 67 (Secus, under our Stat.) "falsely, maliciously &c." sufficient.

To convict of perjury, 2 witnesses, at least, are necessary. Secus, there is oath agt. oath. 1 Ham. 326. n. 10 Mod. 195. O.B. 1784. p. 812 2 Ld. Ch. R. 37. 2 Ib. 535.

How far circumstantial evidence of the fact of the deft. having given evidence is good Qu. 2 McN. 471-4.

Perjury.

Holden, in Eng. that the person injured, by the perjury, could not testify agt. the offender, on public prosecution. 1 Ham. 325. L. Ray. 395 of Fairch. for Beach. ct. of Cr. 1804. Str. 1083. 1104. 1239. 1 Ven. 4g. 1 T. R. 398. 3 H. 27. 305. 4 M. 20. 339. 7 H. 60. 4 Burr. 2253. Decisions contradictory. - Interest in the question if, see Peak. Ev. 95. 115. 1 M & S. 50. 107. 117. 198 & 9. 141-4. It seems he is non competent. Peak. Ev. 140 & n. 4 East. 581.

Two persons cannot be joined in a prosecution for perjury - the offence not joint. Str. 523. 870. 921. 4 Burr. 2462. Barnard. 25. Comp. 4 & 5. B. R. T. T. 3 T. R. 98. - Secus, of subornation, infra. L. R. 885.

Subornation of perjury, is the offence of procuring another to commit perjury - but the perjury must be actually committed. Secus, no subornation. 1 Ham. 325-6. 2 Hk. 137-8. 1 Roll. 41. 57. Kg. Yelv. 72. 3 Mod. 122. Cro. J. 57. 2 Mc. R. 537.

Perjury, & subornation of perjury, punished, at C. L. variously - anciently with death - afterwards, banishment, or cutting out the tongue - then forfeiture of goods - now, fine, & imprisonment, & inability to give evidence. 4 Hk. 138. 3 Inst. 163. Other penalties superadded, by stats. 5 El. - 2 Geo. II.

Inciting one to commit perjury, it not being actually committed is punished at C. L. by fine, & infamous corporal punishment. 1 Ham. 325. b. It is a misdemeanor.

Perjury.

It is a consequence of a conviction of perjury, at C.L, that the offendor can never be a juror. 1 McN. 227-8. 3 Bl. 363.

A variance in the indictment, by the omission, or addition, of a letter, is not material, unless it makes another words. Ex. "Understood" for "understood". Secus, if it does - Ex. "air" for "heir". Comp. 229. Ld. R. 237. Sal. 660. 2 Ham. 239. Doug. 184. n. Fr. 784. Leach. 137. 146. — when assigned on an affidavit of. 2 McN. 511-13.

Under our Stat. perjury, & subornation of it, are punished by forfeiture of $50, imprisonment (now) in state prison, 6 months, if a male; In Com. workhouse, or gaol, if a female. — Disqualified to take an oath in any ct. of record. In case of inability to pay the forfeiture, to be set in the pillory one hour, with both ears nailed

Our Stat. mentions perjury in a ct. of record only: But perjury in a court, of record, or not, is punishable, in Cont., at C.L, by fine, imprisonment, & inability to give evidence: (But the imprisonment at C.L. is not in state prison.)

False affirmation, by Quakers, in Cont., punished as perjury.

By stat. of Cont. if one rose up by false witness, wilfully, & of purpose to take away any mans life, he shall be put to death - see "murder"

of Cts. in Cont. – Sup.r Ct. of all offences punished with death, loss of limb – (Is there any such punishn.t here? – Is there cropping? or banishment?) – also of adultery – exclusive jurisdiction. – Also of divorce (not strictly criminal) – also exclusive jurisdiction of all crimes, punished by confinement in state prison, except that of horse stealing; of which it has concurrent jurisdiction with Co. Cts.

21. Of riots, concurrent with Co. Ct. – It has also jurisdiction of high crimes & misdemeanors. but not exclusive – concurrent with Sup. Ct. So, exclusive jurisdiction of blasphemy (whipping, pillory, binding to good behaviour) – Of crimes inferior to the above, (i.e. to those punished with death or state prison) but beyond the jurisdict. of a justice, – Co. Cts. have, in gen.l, exclusive jurisdiction. – 1 Sw. 95. 101.

No appeal from Co. Ct. to Superior, in Crim.l cases, nor in qui tam prosecn.s 1 Sw. 95. Hist. 269.

Justices of have cognisance (originally exclusive of all crimes, of which the punishn.t does not exceed the penalty of $7. – So. of theft, if the value of the goods exceed not $10. – tho' if the value of the goods be $3.34. whipping superadded – but if the value exceed $10. he has no jurisdiction. Stat. C.

Of breaches of the peace, justices have cognisance unless aggravated, in which case the offend.r is bound over to Co. Ct. a meeting a higher fine, than justices can inflict. In the latter case, he has no jurisdiction, except as a ct. of inquiry. Justices of act as Cts. of inquiry in all criminal cases, above their own jurisdiction; & bind over, or commit, for trial. 1 Sw. 106.

(Cont) – Criminal Jurisdiction.

An appeal lies from the judgmt. of a justice of the to C.C. in all crim.
cases, excepting for the offences of drunkenness, profane swearing
sabbath breaking – selling lottery tickets granted by another state, &
some others.

In criminal cases a Justices jurisdiction is not confined to the
town, in which he dwells. He may hold plea in other towns in the
same County. 2 Root. 357.

Offences are tried here, as in Eng., only in the County, in which they
were committed: We have no stat. on the subject. Kirb. 401 – 2. Doug.
760. 8 Mod. 328. Hely. 79 – 80. 2 Wil. 2 V. 333. 651.

This rule holds, in Cont., as to crim. prosecutions, only, not as to actions
qui tam. Kirb. 401.

When one is arrested for a crime, & brought before a magistrate, (on charge of a crime not cognisable by him) the latter is to inquire into the facts charged, to discover whether he ought to be holden to trial, or not. 4 Bl. 290. 2 Sm. 289-90. Stat. Ct. 142. 420.

But he has no right to examine the prisoner, at C.L. & therefore none here, — we having no Stat. to warrant it. In Eng. it is authorized by Stat. 2 & 3 Ph. & M. 4 Bl. 287, 295. 2 Sm. 390.

If, on enquiry, it appears clearly, that the offence charged has not been committed — or, that the charge agt. the prisoner is wholly groundless, he is to be discharged. 4 Bl. 296. 2 Sm. 389. — Sems, he must be committed to prison, to be kept for trial, or, if the offence is bailable, give bail for his appearance — i.e. furnish security for his appearance. Id.

Bailing, is delivering one to his sureties, on their giving security, &c.

1. Regularly, for all offences below felony, (whether by C.L. or Stat.) the offendor ought to be bailed, unless it be prohibited by Stat. 4 Bl. 297-8. 2 Hal. 127.

2. At C.L. (according to Bl.) all felonies were bailable — even treason & murder: according to others, all offences except homicide. 4 Bl. 298. 2 Inst. 189. 1 Com. 468. 1 Hal 97. 1 Bac. 220. So that the

accused was admitted to bail, in almost every case, at any rate.

3. But the Stat. of Westm. 1. 3 Edw. I, denies bail in treason, & many felonies – & further provisions are made on the subject, by Stat. 23. Hen. VI. c. 1 & 2. Pk. & M. (4 Bl. 298.) In any case of felony, when the party has confessed, or is notoriously guilty. So, in arson, murder, &c. accused not now bailable, in Eng.

But the Eng. Stats taking away the power of bailing, in certain cases, do not extend to B. R. in Eng? This court, or any one of the judges of it, in vacation, may now bail, for any crime, even murder, & treason. Hely. 90. 4 Bl. 299. 1 Bac. 219–23. 2 Inst. 189. Cal. 105. Str. 911. 1242. 2 Hawk. 175–6. Comp. 333. 4 Bur. 2179. They extend only to subordinate, or com. bailing officers, as Jaffr. & justices.

But the Ct. of B. R. will not admit to bail, in those cases, in which bail is prohibited by Stat, unless under special circumstances, in the party's favor. Ex. Where the prosecutor has unreasonably delayed the trial – where the evidence appears very weak – where the prisoner's life is in danger, from confinement. &c. Leach. 122. 2 Haw. 137. 175–6. 5 Mod. 454–5. 1 Salk. 334. Palm. 558–9. 1 Sid. 78. Str. 49. 543. Holt. 85. But in case of illness, it must arise from confinement. 1 Bac. 223–4. Comp. 333.

In prosecutions for offences, amounting only to misdemeanors, at C.L. deft. may appear by attorney. 1 Mod. 59. 4 Bl. 375.

After verdict, however, agt. the deft, he is not admitted to bail, unless prosecutor consents. 1 East. 159. See. 1 McN. 59. This rule has often been dispensed with, in Cont. –

In Cont. all crimes are bailable, except capital, + contempts in open court. 2 Sm. 391.

Our Stat. supposed not to take from the Sup. Ct. the power of bailing, even for capital crimes – any more that Stat. Westm. 1. in Eng. takes it from B. R. – Sup. Ct. supposed to have same powers as B. R. (This, indeed, is expr. by allowed by our stat – in treasury) – It is a gen. rule, that he, who is judge of the offence, may bail the accused, ex officio, at C. L. 2 H. Pl. 120-5. 2 Harr. 98 folio. 148 octavo.

The officer, who arrests the person, cannot, in Cont., take bail in crim. cases. This is done by the magistrate, who acts as a Ct. of inquiry. After commitment, for want of bail, the Shff. may take such bail, as the Ct. of inquiry has prescribed (Ct. Err. 1805. Dickinson v. Kingsbury) (Taken to the State, County, or Town, accord. to the jurisdiction – i.e. as triable, in Sup. Ct., C.C. or by justice)

By the C. L., if a magistrate takes insufficient bail, + the principal does not appear, magistrate is fineable. 2 Pl. 297. 1 Bac. 227. 2 Harr. 142.

In Eng.d 4 sureties are generally required, in case of felony; 2 for inferior offences. 2 Harr. 141. n. 1 Com. 473. see 2 Hal. 125. 10 Co. 101. — Not more than 2. required, here, I believe, in any case.

Refusing bail, where it ought to be granted, is a misdemesnor in the justice, or Shff, at C.L. — as such, punishable by fine, or amercement. The party injured has also his action. 1 Com. 473. 2 Harr. 143. 1 Bac. 228. 1, or, 6 Mod. 179.

Granting bail, when not grantable, is punishable at C.L. as a negligent escape, by fine. It is also punished by several Eng.d Statutes. 2 Harr. 142. 200. 1 Hal. 590-7. 1 Com. 473. 4 Inst. 174, 5, 179.

It has been decided, in Con.t, on a prosecution for forgery, (the deft being out on bail), that the verdict could not be received, unless he is present in Court. (1 Root. 90) Qu. Has not the practice been different? 1 Mc Nally. 375. 1 Bac. 183. Is his presence ever necessary, except on indictment for felony.

If a prisoner prosecuted for a given offence, is acquitted, but proved, on the trial, to be guilty of another, the court may detain him, to be prosecuted for the latter. Leach. 300. 355.

Costs in Criminal Cases.

By our Stat. a person charged with, & tried for, any crime, tho' acquitted, pays the costs — if the prosecution was occasioned by any unlawful, or blameable conduct of his. Ch. 143-4.
If not this occasioned he is dismissed without costs, & then it is paid, according to the old law, out of the treasury, into which the fine would have gone, if he had been fined. All in gen.l fines inflicted by Sup.r Ct. go into State Treasury. Now, by Stat. 1792. costs arising on public prosecutions in the Co. Cts. are paid by the State treasury — & those recovered go into State treasury. Costs, on trials before a single magistrate, still paid out of town treasury.

When costs arise in any criminal proceed.g, in which there is no acquittal, or conviction (i.e. person cannot be apprehended, or, being apprehended, escapes, without the officer's fault, before he is committed) state pays — if the Crime was cognizable by Sup.r Ct. — Does the new Stat. apply to this case.

If the person charged, & tried, is liable to pay costs, but unable, as not having sufficient prop.y — bound out in service to any inhabitant of this state — or of U. S. — But where it cannot be thus obtained payable out of the state treasury if tried by Sup. Ct.

When the evidence before the court of enquiry is not sufficient to hold the accused to trial, costs cannot be taxed agt. him. Kirb. 362.
In Eng.d no costs are paid, on either side, when the crown prosecutes, except in particular cases by special provision of Legislature.
7 Ct. R. 367.